CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 49

HYMAN SCHER, ALIAS WILLIAM SCHER,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 18, 1938.

CERTIORARI GRANTED MAY 31, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 49

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 19, 1938.

—7065

CAPTION.

THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION, SS.

At a stated term of the District Court of the United States within and for the Northern District of Ohio begun and held at the City of Cleveland, in said district, on the first Tuesday in April, being the 7th day of said month in the year of our Lord one thousand nine hundred and thirty-six and of the Independence of the United States of America the one hundred and sixty-first.

Present: Honorable S. H. WEST,
United States District Judge.

THE UNITED STATES OF AMERICA,
vs.
HYMAN SCHER, alias William Scher.
No. 15,516
CRIMINAL.

Be it remembered that heretofore, to-wit, on the 7th day of May, A. D. 1936 came a Grand Jury of the United States, to-wit: J. T. Ball, Wm. H. Barr, J. H. Beer, Joseph Blackford, Paul J. Blanchard, James E. Carpenter, C. E. Conrad, James Cooper, Max Dickerson, Martha Fesen, A. W. Haas, Charles Hoover, Nelle Kelly, Samuel Kessler, David P. Landsdowne, Chas. E. Lindsley, Wm. L. McGraw, Rosemary McMahon, Howard Nist, Mary F. Reichle, Bertha M. Schmitt, and J. K. Waggoner, which said grand jury returned an Indictment endorsed "A true bill, C. M. Fetzer, Foreman," which indictment is in the words and figures following, to-wit:

INDICTMENT.

(Filed May 21, 1936.)

THE UNITED STATES OF AMERICA

NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION, ss.

IN THE DISTRICT COURT OF THE UNITED STATES, within and for the Division and District aforesaid.

At the April Term of said Court, in the year of our Lord, One Thousand Nine Hundred and Thirty-six.

Sec. 1152a, Title 26, U. S. C. A.

The Grand Jurors of the United States of America, duly impanelled, sworn and charged to inquire of crimes and offenses within and for the body of the Eastern Division of the Northern District of Ohio, upon their oath present and find that

HYMAN SCHER,
alias William Scher,

late of the Division and District aforesaid, on or about the 31st day of December, 1935, at Cleveland, in the County of Cuyahoga, State of Ohio, in the Eastern Division of the Northern District of Ohio, and within the jurisdiction of this Court, did knowingly, willfully, feloniously and unlawfully possess in a Dodge DeLuxe Sedan automobile, engine No. DU-158811, serial No. 3911583, license No. LX-418, a quantity of distilled spirits, to-wit: 24 quarts of gin and 13⅓ gallons of whiskey, the immediate containers of said distilled spirits not having affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all Internal Revenue taxes imposed thereon, in violation of Section 1152a, Title 26, United States Code Annotated; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT II

Sec. 1152a, Title 26, U. S. C. A.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and find that the said

HYMAN SCHER,
alias William Scher,

late of the Division and District aforesaid, on or about the 31st day of December, 1935, at Cleveland, in the County of Cuyahoga, State of Ohio, in the Eastern Division of the Northern District of Ohio, and within the jurisdiction of this Court, did knowingly, willfully, feloniously and unlawfully transport in a Dodge DeLuxe Sedan automobile, license No. LX-418, serial No. 3911583, engine No. DU-158811, a quantity of distilled spirits, to-wit: 24 quarts of gin and 13⅕ gallons of whiskey, the immediate containers of said distilled spirits not having affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all Internal Revenue taxes imposed thereon, in violation of Section 1152a, Title 26, United States Code Annotated; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

E. B. FREED,
United States Attorney.

No. 15,516.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

THE UNITED STATES OF AMERICA,

vs.

HYMAN SCHER, aka William Scher.

INDICTMENT.

Sec. 1152a, Title 26, U. S. C. A.

A true bill,

C. M. FETZER,
Foreman.

E. B. FREED,
U. S. Attorney.

(Filed May 21, 1936.)

F. J. DENZLER, *Clerk,*
U. S. District Court, N. D. O.

ORDER OF ARRAIGNMENT AND PLEA OF NOT GUILTY.

(Entered May 25, 1936 by S. H. West, Judge.)

Defendant appeared, was arraigned and entered a plea of not guilty; bond continued.

MOTION TO SUPPRESS EVIDENCE AND AFFIDAVIT OF HYMAN SCHER.

(Filed April 30, 1937.)

Now comes the defendant, Hyman Scher, in the above entitled cause, and moves the Court to suppress all of the evidence obtained by the search made by the Revenue agents in the above entitled cause, together with all information obtained by reason of such search, and to grant an order requiring the agents to return all articles seized by reason of said search for the following reasons, to-wit:

1. Because the search made of the premises as set forth in the annexed affidavit and the seizure of the property therein mentioned was unlawful in that the officers making the search violated Section 14, Article 1, of the Constitution of the State of Ohio, and the 4th and 5th Amendments of the Constitution of the United States.
2. Because the search of the premises as set forth in the annexed affidavit was unlawful, the said officers having no probable cause to search said premises.
3. Because the search of the said premises, which is part of a private dwelling, was made without a search warrant and not incident to any lawful arrest.

4. Because the said Federal agents are holding said property intending to use it as evidence in the trial of the above cause and the defendant's constitutional rights with regard to searches and seizures will be violated if the said prohibition agents are permitted to offer the property they seized in evidence or to give the evidence they have obtained by reason of said unlawful search and seizure.
5. Because the said premises were searched without a search warrant and without probable cause to believe that a crime was being committed at the time the search was made and in violation of the defendant's rights under our State and Federal Constitutions.
6. Because the premises searched in this cause was a private dwelling and the Government has not shown sufficient facts to justify a search under our State and Federal Constitutions.
7. Because the officers who made the search were trespassing upon the land of the defendant within the curtilage of his dwelling house when they allege they discovered facts by reason of which they claim probable cause for the search of the premises existed.
8. Because the search was made without any warrant for the arrest of the defendant.

This motion is based upon the files and records in this cause and upon the affidavits of Hyman Scher and oral testimony offered at the hearing.

GERALD A. DOYLE,
Attorney for Defendant,
521 Guarantee Title Building,
Cherry 4953.

Copy of the within motion received this 30th day of April 1937.

ROY C. SCOTT,
U. S. District Attorney.

AFFIDAVIT OF HYMAN SCHER.

UNITED STATES OF AMERICA,
STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

HYMAN SCHER, being first duly sworn on oath, according to law, deposes and says that he is a resident of the City of Cleveland, County of Cuyahoga, State of Ohio, and a citizen of the United States; that his regular home and domicile 10025 Olivet Avenue, Cleveland, Ohio, and has been continuously for the past fifteen years and upwards; that said domicile and residence above set forth consist of his residence, home and private garage; that on the 31st day of December, A. D. 1935 certain officers went upon the above said premises and without having then and there a regular search warrant searched said premises and took from said premises ninety-two one-fifth gallons of alleged liquor and one 1935 Town Sedan Dodge automobile, serial number 3911583, 1935 license number LX-418.

Affiant further says that he is the sole and separate owner of the said liquor and said Dodge automobile; that on the said 31st day of December, 1935 at about 1:30 in the morning, certain men representing themselves to be officers came upon said premises and without having a search warrant as aforesaid, searched said automobile which was then and there located in the garage adjoining the home of affiant at 10025 Olivet Avenue, Cleveland, Ohio; that said officers then and there seized said automobile and said ninety-two one-fifth gallons of alleged liquor and then and there took the same into their possession and now have the same in their possession.

Affiant further says that said search and seizure was unreasonable and unlawful and in direct violation of the Fourth Amendment of the Constitution of the United States and in direct contravention thereof; that said search was conducted without probable cause and without a search warrant.

Affiant further says that attached hereto and marked Exhibits A and B respectively, is a true and correct photograph of the garage where said automobile and said alleged liquor was seized, and the premises so searched; that said pictures reflect the true physical condition of said garage and its relationship and proximity to the home of affiant.

HYMAN SCHER.

Sworn to and subscribed before me, a Notary Public, this 26 day of April, 1937.

H. M. WITSHOIK,
Notary Public.

(Notarial Seal)
Tax fee

My commission expires Nov. 12, 1938.

MEMORANDUM OF WEST, JUDGE.

(Filed May 5, 1937.)

WEST, *J.*

At defendant's request I have again considered the validity of the search and seizure in the light of *United States v. Kind,* 87 F. (2d) 315, recently decided.

The evidence respecting the question, taken before the former trial, is again relied upon, no further testimony being produced.

The *Kind* case appears to have turned upon whether the agents who saw cans such as were "usually used in transporting Belgian alcohol," in a small garage, after learning from an investigator that Kind's car had been used for transporting and delivering alcohol, and who, the court said, acted on advance information which was merely a tip from an unknown source, had reasonable ground for believing that the car which Kind was seen to drive into this garage, contained unstamped liquor.

In the case at bar the testimony showed that the agents "had information from a source which had heretofore been reliable, to the effect that the Carr-Burke-Rosenthal gang were operating from headquarters at that address, 10838 Drexel, and that they were putting out the same kind of phoney whiskey as they had at 10600 Drexel Avenue, and that around midnight or shortly after, a load of this whiskey would be taken from that premises in a Dodge car license LX-418."

They testified that the car in question appeared at 10838 Drexel at 9:30 p. m. This was a private residence and not a liquor store. The car was then parked in the street and remained about an hour, when a man resembling Scher came out carrying a package, and accompanied by three women, boarded the car and drove away. The car returned at midnight, was driven into the premises, stopped at the rear, not entering the open garage, and remained about half an hour, with lights extinguished. During this time one of the agents heard evidence clearly warranting a belief that the automobile was being loaded with packages wrapped in heavy paper. A man, later identified as Scher, entered this car, later found to bear the license number in question, and as he drove it away it appeared more heavily laden than when the women had been in it.

The agents followed in their own car, and as they were closing up on Scher, he suddenly turned into the driveway of his residence and proceeded into his garage. One of the agents immediately followed and questioned the defendant as to what he had. Even without the damaging answer to the inquiry whether the liquor was tax paid, that it was "Canadian whiskey," I think this and the other surrounding circumstances presented facts within the personal knowledge of the agents sufficient to lead a reasonable discreet and prudent man to believe that liquor was illegally possessed in the automobile to be searched, as stated in *Husty v. United States*, 282 U. S. 695.

The agents had kept Scher's car under observation prior to the seizure and knew that it had been loaded at the Drexel Avenue residence under most suspicious circumstances of time, place and method; that it carried a heavy load which they might well conclude was the phoney whiskey of their information, done up in paper wrapped containers. That this information was insufficient as legal evidence was not fatal, see *Husty* case, *supra*.

In the *Kind* case the officers had no previous contact with the automobile, but simply saw it drive into a suspected garage; and as to whether it carried anything, and if so what, were without knowledge. This, as well as the difference between their mere tip and the information from a reliable source, as to which the agents testify as witnesses for the defendant, seems to distinguish the cases.

Further, in *Kind's* case the court found that the officers had ample time to procure a search warrant. That is entirely problematical here. Certainly no warrant could be procured at 1:00 o'clock of a mid-winter morning. Scher had made one trip from the Drexel Avenue place and then had returned for this load. For all the officers knew or were required to anticipate, he may have intended before the night was over, to drive to some other destination.

Assuming that search at his garage without warrant is presumed illegal, I think the facts overturn such presumption. From them the officers could reasonably conclude that an offense had been committed in their presence and therefore could legally search and thereafter place the defendant under arrest. See *Husty* case, *supra; Ferracane v. U. S.*, 47 F. (2d) 677 (C. C. A. 7).

I adhere to my former decision.

WEST,
Judge.

May 5, 1937.

JURY IMPANELED AND SWORN—TRIAL IN PROGRESS; ADJOURNED UNTIL TOMORROW MORNING.

(Entered May 6, 1937 by S. H. West, Judge.)

This day came the parties by their attorneys and also came the following named persons as jurors, to-wit: Wm. J. Abbot, Clara V. Anderson, C. B. Armstrong, Harry M. Beardsley, Lydia Black, N. A. Brush, Lon A. Cornell, Earl Culler, Amos Day, Elmer Deiringer, Guy S. Gardner and H. F. Goodrich, who were duly impaneled and sworn according to law and the trial proceeded. And the jury having heard the opening statements of counsel for the parties and all of the testimony

adduced on behalf of the plaintiff, thereupon the defendant by his attorney, moved the Court to arrest the testimony from the jury and direct a verdict in his favor, which motion was overruled by the Court, to which ruling of the Court the defendant by his attorney, excepts. And the jury having heard all of the testimony adduced on behalf of the defendant, and the hour for adjournment having arrived, the further trial of this cause was postponed until tomorrow morning at 9:30 o'clock.

TRIAL CONCLUDED; VERDICT OF GUILTY AS TO FIRST AND SECOND COUNTS OF INDICTMENT; SENTENCE OF ONE YEAR AND ONE DAY; JUDGMENT.

(Entered May 7, 1937 by S. H. West, Judge.)

This day again came the parties by their attorneys and also came the jury heretofore impaneled and sworn herein and the trial proceeded. And the jury having heard the argument of counsel and charge of the Court, retired to their room in charge of a sworn officer of this court to deliberate upon their verdict. And now come said jury into open court with their verdict in writing, signed by their foreman, which verdict reads and is in the words and figures following to-wit:

"District Court of the United States of America Northern District of Ohio Eastern Division April Term, 1937. The United States Plaintiff, vs. Hyman Scher Defendant, No. 15516 Criminal Verdict. We, the jury in the case, being duly impanelled and sworn, do find as to the First Count of the Indictment, the Defendant is Guilty; as to the Second Count of the Indictment, the Defendant is Guilty. Guy S. Gardner, Foreman."

which said verdict was by the Clerk of this Court read in the hearing of said jury, when to which they gave their assent.

Defendant sentenced to be imprisoned in a penitentiary as designated by the Attorney General for a period of one year and one day from date, to pay a fine of $500.00 and costs in the sum of $109.60 for which sums judgment is rendered and execution awarded for the collection thereof.

ORDER OVERRULING MOTION OF DEFENDANT TO SUPPRESS.

(Entered May 7, 1937 by S. H. West, Judge.)

This day this cause came on to be heard upon the motion to suppress filed by the defendant in the above entitled case, and the Court being fully advised in the premises,

It is ordered that the said motion be and the same is hereby overruled. Exceptions to defendant.

VERDICT.

(Filed May 7, 1937.)

We, the Jury in This Case, being duly impanelled and sworn, do find as to the First Count of the Indictment, the Defendant is Guilty, as to the Second Count of the Indictment, the Defendant is Guilty.

Guy S. Gardner,
Foreman.

MOTION FOR NEW TRIAL.

(Filed May 7, 1937.)

Now comes the defendant, Hyman Scher, by Gerald A. Doyle, his attorney, and moves this Honorable Court to set aside the verdict returned against him by the jury on May 7, 1937 and to grant him a new trial for the following reasons:

1. That the verdict was not sustained by sufficient evidence and was contrary to law.
2. That the verdict was contrary to the weight of the evidence.
3. That the Court erred in the submission of certain evidence over the objection of the defendant.
4. That the Court erred in overruling defendant's motion made at the end of plaintiff's case, requesting the Court to take the case from the jury and direct a verdict in favor of defendant.
5. That the Court erred in rejecting testimony offered by defendant.
6. For other errors appearing on the record.
7. That the Court erred in overruling defendant's motion to suppress the evidence.
8. That the Court erred in the exclusion and omission of testimony.
9. That the Court erred in its charge to the jury.
10. For abuse of discretion by the Court by which the defendant was prevented from having a fair trial.

GERALD A. DOYLE,
Attorney for Defendant.

Notice.

Plaintiff will take notice that the above motion has been filed and the same will be on for hearing according to the rules of this Court.

GERALD A. DOYLE,
Attorney for Defendant.

Acknowledgment.

Service on the motion is hereby acknowledged this 7th day of May, 1937.

ROY C. SCOTT,
Asst. U. S. District Attorney.

ORDER OVERRULING MOTION OF DEFENDANT FOR NEW TRIAL.

(Entered May 7, 1937 by S. H. West, Judge.)

This day this cause came on to be heard on the motion of defendant for a new trial, and was submitted to the Court; on consideration thereof the Court overruled said motion, to which ruling of the Court the defendant by his attorney, excepts.

NOTICE OF APPEAL BY DEFENDANT HYMAN SCHER AND SERVICE UPON U. S. DISTRICT ATTORNEY.

(Filed June 29, 1936.)

NAME AND ADDRESS OF APPELLANT:

The appellant's name is Hyman Scher and his address is 10025 Olivet Avenue, Cleveland, Ohio.

NAME AND ADDRESS OF APPELLANT'S ATTORNEY:

Gerald A. Doyle, 521 Guarantee Title Building, Cleveland, Ohio.

OFFENSE:

Violation of Section 1152A, Title 26 U. S. C. A., to wit: Violation of the Internal Revenue Laws.

DATE OF JUDGMENT:

June 26, 1936.

DATE OF SENTENCE:

June 29, 1936.

BRIEF DESCRIPTION OF JUDGMENT AND SENTENCE:

The appellant was found guilty under this indictment, which contained two counts, wherein he was charged with knowingly, willfully, feloniously and unlawfully possessing in a Dodge DeLuxe Sedan automobile,

engine No. DU-158811, serial 391-1583, license XL 418 a quantity of distilled spirits, to wit, 24 quarts of gin and 13 one-fifth gallons of whiskey, the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein, in violation of Section 1152A, Title 26, U. S. C. A.

That the defendant did knowingly, willfully, feloniously and unlawfully possess in a Dodge DeLuxe sedan automobile, engine No. DU-158811, serial 391-1583, license XL 418 a quantity of distilled spirits, to-wit, 24 quarts of gin and 13 one-fifth gallons of whiskey in violation of Section 1152A, Title 26, United States Code Annotated.

The defendant was found guilty on June 26th, 1936 and the Court, on June 29th, 1936 passed sentence as follows: That the appellant be imprisoned and confined in the U. S. Reformatory at Chillicothe for a period of one year and one day and pay a fine of $300.00.

I, HYMAN SCHER, the above named appellant hereby appeal to the U. S. Circuit Court of Appeals for the Sixth Circuit from the judgment above mentioned on the ground set forth hereinafter.

HYMAN SCHER.

Dated June 29th, 1936.

Grounds of Appeal.

1. The judgment and sentence are contrary to and against the manifest weight of the evidence and are contrary to law.

2. The judgment and sentence are not supported by any substantial evidence and are contrary to law.

3. That the Government failed to prove that the defendant had conscious knowledge that the liquor in his possession was non-tax paid.

4. That the Government failed to prove that the liquor found in the possession of the defendant was not for his own use.

5. That the Court erred in overruling defendant's motion at the close of the Government's case in chief to direct the jury to return a verdict of "not guilty" of the offense charged for the reason that the Government failed to prove that an offense had been committed under Section 1152A, Title 26, U. S. C. A.

6. That the Court erred in overruling the defendant's motion to suppress the evidence.

7. For other errors occurring at the trial and excepted to by counsel for the defendant.

GERALD A. DOYLE,
Attorney for Appellant,
521 Guarantee Title Bldg.,
CH 4953

Receipt of a copy of this notice of appeal is hereby acknowledged this 29th day of June, 1936.

E. B. FREED,
U. S. District Attorney.
By JEROME CULTIS.
per L. N.

ORDER DIRECTING APPELLANT TO LODGE BILL OF EXCEPTIONS.

(Filed March 15, 1937.)

Pursuant to notice, counsel for the parties this day appeared for directions for preparation of the record herein on appeal. The undersigned trial judge hereby directs appellant on or before June 5th, 1937 to procure his bill of exceptions setting forth the proceedings upon which he wishes to rely in addition to those shown by the clerk's record as described in Supreme Court Criminal Procedure Rule VIII and lodge the same with the clerk, at which time he will file with the clerk his assignment of the errors of which he complains and also a praecipe stating the portion of the clerk's record to be included in the record on appeal. Appellant will thereupon notify the United States Attorney of the time, not more than three days thereafter, when he will ask the trial judge to settle and sign his bill of exceptions. Such bill must

conform to Rule VIII of the General Rules of the Supreme Court, will be settled not later than June 8th, 1937 and upon such settlement appellant will file the same with the clerk.

Upon the filing of the assignment of errors and of the bill of exceptions after settlement, the clerk will proceed as provided by Supreme Court Criminal Procedure Rule IX and Circuit Court of Appeals Rule 18, Section 7.

S. H. West,
United States District Judge.

May 15th, 1937.

ORDER FIXING BAIL BOND.

(Entered May 7, 1937 by S. H. West, Judge.)

This day this cause came on to be heard on the motion of defendant for an order releasing him from custody of the United States Marshal upon his giving bail in such amount as fixed by the Court, and was submitted to the Court; on consideration thereof the Court ordered the defendant be admitted to bail in the sum of $2000.00.

BAIL BOND.

Supersedeas Recognizance.

(Filed May 7, 1937.)

Know all Men by these Presents, that we Hyman Scher, as principal, and United States Fidelity and Guaranty Company as surety, are held and firmly bound unto the United States of America in the full and just sum of Two Thousand Dollars ($2,000.00), for the payment of which to the said United States of America well and truly to be made, we and each of us, do hereby bind ourselves, our successors, personal representatives, and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 7th day of May, A. D. 1937.

WHEREAS lately, at a session of the District Court of the United States for the Northern District of Ohio, Eastern Division, in a suit pending in said Court, at Cleveland, Ohio, between the United States of America as complainant and Hyman Scher as defendant, a Judgment was rendered against said Hyman Scher defendant, on the 7th day of May, 1937, sentencing said Hyman Scher to be imprisoned for a term of one year and one day in a penitentiary as designated by the Attorney General (Chillicothe, Ohio) and also to pay a fine of Five Hundred & 00/100 Dollars ($500.00), and costs of prosecution, and the said defendant Hyman Scher having obtained an appeal from said Court and filed a copy thereof in the Clerk's office of said Court to reverse the Judgment in the aforesaid suit; and whereas the said defendant Hyman Scher desires said appeal to operate as a stay of execution and to be admitted to bail and to be permitted to be and remain at large on bail pending said proceedings on appeal to the said Circuit Court of Appeals for the Sixth Circuit.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said Hyman Scher shall prosecute his appeal to effect, and if he fail to make his plea good, shall also personally be and appear here in this Court from day to day during the present term and from term to term of this Court thereafter, pending said proceedings on appeal, and shall surrender himself to the United States Marshal of this district and be present to abide the Judgment of this Court or that of the Circuit Court of Appeals for the Sixth Circuit and serve his sentence and not depart the jurisdiction of this Court without leave thereof, then this obligation to be void; otherwise to remain in full force and virtue.

HYMAN SCHER.

UNITED STATES FIDELITY AND GUARANTY CO.
M. H. KOSSER, *Attorney-in-Fact.*

Taken and acknowledged before me at Cleveland, Ohio, this 7th day of May, A. D. 1937.

C. B. WATKINS, *Clerk.*
By K. V. WILSON,
Deputy Clerk.

Approved this 7th day of May, 1937.

S. H. WEST,
U. S. District Judge.

ORDER FIXING TIME FOR PREPARATION OF RECORD.

(Filed May 8, 1937.)

It appearing to the undersigned trial judge that the defendant on May 7th, 1937 filed with the clerk of this court his notice of appeal:

Therefore, pursuant to Rule VII of the Supreme Court prescribing procedure in criminal cases, it is hereby ordered and directed that the above mentioned appellant or his attorney and the United States Attorney appear before the undersigned trial judge at the Federal Court House in Cleveland on the 15th day of May, 1937 at 10 o'clock a. m. for appropriate directions respecting the preparation of the record on appeal and other matters mentioned in such rules.

The clerk will forthwith serve a certified copy hereof by mail upon appellant or his attorney and upon the United States Attorney.

S. H. West,
United States District Judge.

May ....., 1937.

DEFENDANT'S NARRATIVE FORM BILL OF EXCEPTIONS.

(Filed June 8, 1937.)

Be it remembered that on the trial of the above entitled cause, in the District Court of the United States, Northern District of Ohio, Eastern Division, at the April 1937 term thereof, before Honorable Samuel H. West, one of the judges of said court, the following proceedings were had:

Trial had May 4, 1937.

Appearances: For the plaintiff, Roy Scott, Assistant United States Attorney. For the defendant, Gerald A. Doyle, Esq.

It was thereupon stipulated and agreed that the testimony previously received in this case on the motion to suppress the evidence, as found in the record before the Court of Appeals, pages 20 to 28, inclusive, be received as the evidence on said motion on this trial. Said pages being as follows:

On motion to suppress evidence, hearing of June 20, 1936:

DEFENDANT'S TESTIMONY.

HYMAN SCHER, the defendant, offered himself as a witness, and, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is Hyman Scher. I am the defendant in this action and live at 10025 Olivet Avenue. I have lived there about 14 years. My dad and mother, my brother, sister, my brother and sister-in-law live there with me. It is a two-family home and we occupy the upstairs. I would say the garage is about six feet away from the house.

Exhibits A and B are pictures of the house and garage, and show the condition as of December 30, 1935. I was arrested on that day by the officer over there (indicating), and another one I don't remember the name. About seven cases of liquor and a Dodge automobile, property of mine, were taken by the officers. They did not have a search warrant or other warrant. That place where I lived was not used for any business of any kind. There is no business on the street near there of any kind.

To my knowledge there had not been any trafficking in liquor around these premises. I have never been arrested or convicted of any liquor charge, or anyone else in my family.

CROSS EXAMINATION by Mr. McNamee.

I am 28 years old, and have been with my brother in the hat business, manufacturing and renovating men's hats at 1102 Prospect. I have been with him for two years. Previous to that I had my own business, in ladies ready to wear. Just my brother and I were in that hat shop; it was not a corporation. Max Diller worked there, also Harold Pilley and Mrs. Weiss. A person by the name of Marcus worked for us, but we fired him. He worked last July. He was with us since the business opened until last July, about a year and a half. Marcus is no relation to me. He is a brother-in-law to my brother.

There were 84 bottles of liquor in the seven cases. The liquor was Scotch, bourbon and gin. I don't remember the proportions. I got that liquor at 10838 Drexel around midnight. I was there at first around 9:30. I went away and I came back around midnight. I was not there very long when I returned. That was a single home. A party by the name of Carr lived there. I believe I heard them call him Jack, somebody called him Jack. I just met him that day up at his house; I was sent over there. The first meeting was when I was there the first time at 9:30. There was some women also there. I believe one of them was his wife, I don't know who the other two were. Those women left there with me when I left about 9:30. I took them out to the Heights. One of them gave me the direction, I don't know, I am not very familiar with the Heights. I also went to my brother's. The purpose of my going to my brother's was just telling him I was getting some bargain on some liquor. I went to talk to him. I had a case with me, a case of whiskey, when I went to my brother's. I was given to believe it was whiskey, there was six in the package. I opened the case when I got there and there were 12 bottles in that case.

I was driving a Dodge car license LX-418. That car was registered in my brother's name. The bill of sale was recorded in my brother William's name. William is the brother that lives at my home. Sam is the brother to whom I took the case of liquor at 3287 Westminster. My younger brother Irv is in the hat business

with me. The brother Sam is the one that is related to Marcus. Sam is the sales manager of the automobile concern. When we had Marcus he had some business dealings with fellows and we let him go. I don't know if they were liquor dealings. People started questioning him around the store, and we let him go. My brother talked to somebody, he claimed they were from the internal revenue, and when we found that out we just told him he would have to go.

I went to Carr's place by myself on this evening for the first trip. I introduced myself to Carr. I hadn't known him before that. I didn't know if there was liquor there but I was told to go over there. I went there for the purpose of getting liquor. I got the information there was liquor there from some fellow down at the store. I don't know that fellow. You know a store that people come in and out, you get in conversation and he happened to tell me where I could get some. I got that information during the same day. This fellow called Carr up from the Hotel Carter Drug Store, called him up and told him he was sending me out. I was driving this same Dodge car at the time I was arrested. The seven cases of liquor were in the trunk compartment, which is located on the rear of the car.

I was at Charleston, West Virginia, about three or four weeks before the time I was arrested. I had not been down there doing business with a man named Corter at the Daniel Boone Hotel. I went down to Charleston, we had a Mr. Lennon, who is sales manager of our store, he told us there is an opportunity to rent a store in Charleston, there is no hat renovating store and manufacturer of men's hats, and he told me to go down there and look around. I went down there and I didn't see any store and I come back. At no time before I was arrested did I meet a man named Corter. I had this Dodge car down there in which I was transporting liquor on the night of my arrest. That car had been purchased from Blaushild in Cleveland. I did not send a telegram to Corter, to Charleston, West Virginia, a few days before I was arrested. My first name is Hyman. I am not also called "Hy." I have a telephone at home and had one in December, Garfield 0626. There is nobody else at that address named "Hy."

Q. Now, I will ask you if you didn't send to O. D. Corter, address 235½ Maple Street, Clarksburg, West Virginia, under date of December 24, 1935, a Western Union wire reading: "Did not receive check stop In

Wheeling Merry Christmas" signed "Hy," and that that message was telephoned to the Western Union from your phone number, Garfield—626—what about it? A. I did not send it. I do not know anything about it.

The Court: Your questions, as I recall, have related to Charleston, West Virginia.

Mr. McNamee: I recall that now. I am sorry. I was mistaken at the time I asked. It is Clarksburg.

Q. To straighten out the matter, where I said Charleston, West Virginia, I should have said Clarksburg. Now, were you in Clarksburg, West Virginia, at or around the Christmas season of 1935? A. No.

(Narrative continued) At no time did I see a man named Corter at the Daniel Boone Hotel there, and I did not send this telegram to this man Corter. I wasn't in Clarksburg, West Virginia, three or four weeks prior when I was in Charleston. I was never in Clarksburg, nor was this Dodge car in Clarksburg.

I couldn't tell you who loaded the seven cases of liquor into my car because I was in the living room and the car was in the back. I was told there would be seven cases in the car. I paid this Carr $145 for it. I couldn't see if there were tax stamps on that liquor; it came in packages. This was a private residence, not a state store. I didn't pay any attention as to whether there were tax stamps on the liquor I took to my brother. I opened it.

At the time I was placed under arrest the car was in the garage. I drove in there and got out of the car. I saw someone come rushing in with a searchlight, a flashlight, started waving with his flashlight. Between the address at which I got the liquor and my home I had stopped at a gasoline station, got some gas and went in and got a paper.

RE-DIRECT EXAMINATION by Mr. Doyle.

I did not have that liquor for sale or for the manufacture of any articles containing liquor.

As to why the Dodge car which was taken from me was registered in my brother Will's name instead of my own name,—when I was in business my store was burglarized and they took all my merchandise away, I couldn't pay for it, my credit was shot. My brother's credit was good so he gave me full consent to buy it in

his name. That was in 1932 when my store was burglarized. The newspaper clippings now shown me describe that burglarizing of my store.

RE-CROSS EXAMINATION by Mr. McNamee.

I arranged for the purchase of this car to help my brother who was in the automobile business. That was my brother Sam. That arrangement was made out at Benny Blaushild's. I believe arrangements were made with my brother, who worked for Blaushild Company. My brother sold the car on behalf of the Blaushild Company. Notes were signed for the car. I signed the notes in my brother's name. He told me I could sign them. That was my brother William. My brother Sam wasn't there at the time. The people from Blaushild's were there when I signed the notes with William Scher's name. They knew I wasn't William Scher. I didn't tell them; they knew it. A mortgage was also signed with the name William Scher by me at the same time. Associates Investment was the finance company carrying the notes. Payments were made on the notes after the car was purchased in October to Associates. I made it or my father made it. I didn't have any conversation with the Associates. I never disclosed to them I wasn't William Scher.

This is not the first car I have had. The car before this that I had was a Plymouth. I had that from September until October last. I turned the Plymouth back to the C. I. T. That was bought from the Arrow Motor Sales out on 152nd and St. Clair in Cleveland in my own name. I signed notes for that one also. The C. I. T. Investment carried the notes for that car. A mortgage was also signed on that car in my name. I made some payments on that car. I had an Auburn car before that. That was bought from B. W. Blaushild by me in my name, and notes and the mortgage were signed in my name. The payments were made to the Associates Investment Company. That Auburn was bought a year ago, December or November, 1934. I did not complete paying for the car but turned around and traded the Auburn for a Plymouth. It was only the last car that was purchased in the name of William Scher. My credit didn't warrant me buying a new automobile.

This burglary took place in 1932. My credit was not good because of the burglary.

(Newspaper clipping, Defendant's Exhibit C, and photographs marked Defendant's Exhibits A and B, offered and received in evidence and are attached hereto and made a part hereof.)

Mr. Doyle: I offer the exhibits and I rest.

Mr. McNamee: The government moves for the dismissal of the motion.

(Argument had; counsel for defendant granted permission to introduce further testimony.)

SIDNEY M. BOWES, a witness called by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is Sidney M. Bowes; occupation, Investigator, Alcohol Tax Unit, and I was such on December 30th last. I am one of the officers who arrested Hyman Scher, the defendant. We had no warrant for any premises or for the defendant, no warrant of any kind. The arrest was made just outside of the garage of the defendant. The car was in the garage. The liquor was found in the rear of the car where he told us it was.

With other officers I had been observing, since about 8:00 P.M., the premises known as 10838 Drexel Avenue, Cleveland, Ohio. We had information from a source which had heretofore been reliable to the effect the Carr-Burke-Rosenthal gang were operating from headquarters at that address, 10838 Drexel, and that they were putting out the same kind of phoney whiskey as they had at 10600 Drexel Avenue, and that around midnight or shortly after a load of this whiskey would be taken from that premises in a Dodge car, license LX-418. We posted ourselves about 8:00 P.M. in these premises, and I believe it was around 9:30 we first saw this car arrive at the premises, this Dodge car LX-418, and remain there for about an hour, and at the expiration of that time a man resembling the defendant, I couldn't positively identify him at that time, came from this single dwelling at 10838 Drexel Avenue, accompanied by three women, got into the car and drove away. When he came to the car the man I saw come out had a package in his hand of the same size and shape as those later seized containing whiskey. We followed the car away. As I say, it was about two hours, about the time expiration of our information the load was to be hauled. The car returned

around midnight or a few minutes later. Previously it had parked in the street. This time when it returned it drove up toward the garage. The garage doors were open. The night was a bitter night, snow on the ground, the car didn't drive into the garage, stopped at the rear corner of the house, near the door which led into the basement on the ground level. The car remained there for approximately a half hour. During that time I observed the premises, saw what I have stated, saw the lights of the car were out, and then I saw Investigator Williamson approach the premises, remain ten or fifteen minutes, then come back to the car where I was and communicated to me what he had seen and observed. About 12:30 the car left and we followed. There was one person in it when it left. There had been the driver and three women in it when it arrived. It appeared to me the car was loaded heavier when it left with one man in it than it had with the three. We followed the car a distance of two or three blocks, where it stopped at a gasoline station. I saw a man, later identified as the defendant, get out of the car as soon as he got to the station, go across the street, remain a minute or two, come out with a paper in his hand, return to the car, and immediately leave with it. We were half a block away making observation. We followed him about two or three blocks, were closing up close to the car when he went into this drive at 10025 Olivet Avenue. He was coming slowly to a stop and we couldn't make a quick stop on account of the streets being slippery. As the car slowed to a stop I jumped out of the car, and followed the car back to the garage with my flashlight. The car was standing in the garage, the headlights were on, and the defendant Scher had alighted from the car and walked to the back door of the garage. I had a bag and I had the flashlight and I said, "I am a federal officer, I have a tip that this car is hauling bootleg liquor." The defendant said, "Just a little for a party." I said, "Is it tax paid?" He said, "It is Canadian whiskey." I said, "Is it in there?" He said, "It is." After that I opened the trunk, found the trunk full of these cases, I think 14 packages, it totalled 88 bottles in that trunk, and two bottles next to the driver's seat. After we examined these bottles—we didn't examine them all then, examined several, found there was no tax stamps on the bottles or the cases, and the defendant was then placed under arrest, the car and whiskey taken away from him.

CROSS EXAMINATION by Mr. McNamee.

As near as I can judge, those packages were identical with the packages I had seen earlier in the evening when he first came away from the house. Officer Williamson was on this job with me. He is now on leave and will return on Monday. He made some observations of matters that I did not see or hear myself. He communicated to me.

Mr. Doyle: I will admit if Officer Williamson was here he will testify the same as the present witness.

The Court: You may with that agreement relate to the Court what Williamson told you he saw or heard in your absence.

The Witness: He said, "I heard something heavy set down, like wood, and heard it slide, like it was heavy paper, across a wooden surface, and I heard the house door slam, the trunk slam, and the door of the car slam." He stated a conclusion. I don't know whether you care to hear it or not, a conclusion on his part.

The Court: No, the Court would like to know what material the so-called cases were made out of?

The Witness: It was a heavy, very heavy wrapping paper with at least two wrappings, very heavy brown paper.

The Court: Containing each how many bottles?

The Witness: Six bottles to each one. And then a heavy cord around crossways, so that it was handy to pick it up. The cords were both ways.

(Narrative continued) The bottle now shown me was one of the bottles. There were 24 like this filled. They weighed a bottle and it weighed four pounds, seven and a half ounces. There were 90 bottles all told—88 and 2 in the seat beside the driver. The trunk was on the extreme rear of the car; the conventional place for an automobile trunk, extreme rear of the car. It extended over the rear axle. The trunk door turned with one hand.

The Court: When you stated a while ago the car seemed to ride heavier, just what did you mean?

The Witness: I meant I had seen the car there with the driver and three women in it and saw it traverse perhaps half a block and turn in this driveway. I seen it traverse about the same distance when it left, and when it came out, when we followed it,

the car in which we subsequently found the whiskey there was one driver, one person the driver, and the rear end as it drove along and went over the bumps would seem to be tail heavy, or heavier than it was when there was three women in it.

RE-DIRECT EXAMINATION by Mr. Doyle.

I didn't observe the springs on this Dodge car at all. I didn't say I seen the springs.

There were six bottles in a package, as I recall, each one. They were wrapped in wrapping paper. Each one was the same.

Mr. Doyle: That is all. I rest again.

The Court: Do you have any testimony?

Mr. McNamee: Nothing to offer.

The Court: I think I will just state that the matter is submitted and examine the briefs.

Mr. Doyle: I will call your attention to this lacking in this proof, not one word did these officers ever have that there was even any tax unpaid liquor, the best they had was information that phoney liquor would be transported.

The Court: I will consider that.

Thereafter the Court overruled the defendant's motion to suppress evidence; to which ruling of the Court the defendant duly excepted.

On May 6, 1937, before a jury duly impanelled and sworn, the same counsel being present; the following proceedings were had:

PLAINTIFF'S TESTIMONY.

EARL F. WILLIAMSON, a witness called by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Scott.

My name is Earl F. Williamson; occupation, Investigator Alcohol Tax Unit, Bureau of Internal Revenue. I was so employed December 31, 1935.

I know the defendant. I saw him on December 30, 1935 about 10:30 p.m. the first time. I then saw him about 12:15 or 12:30 a.m. of the morning of December 31st. On the occasion on the 30th I saw him and three women come out of a house on Drexel Avenue, get into

Q. What was the reason for your going out there in this vicinity? A. I received reliable information from a confidential informer that a certain 1935 Dodge sedan, license LX-418—

Mr. Doyle: I object to the answer, and ask that it be stricken on the ground it is hearsay, and information obtained or statements made not in the presence of the defendant.

The Court: You may save the point.

Mr. Doyle: Exception.

Q. Proceed. A. That a load of tax unpaid distilled spirits in bottles would be taken from this address or would be taken from a house on Drexel Avenue at about 12:30 a.m. I got the exact address. I will have to refer to my notes. (After referring to same.) 10838 Drexel Avenue.

Q. What did you see on that night? Did you see the defendant after this time you have just spoken of? A. I saw the defendant at about 12:15, between 12:15 and 12:20 a.m. the morning of the 31st return to the premises in this Dodge sedan, drive into this side yard, and around to a point directly at the rear of the house.

Q. Where were you at the time? A. I was standing on the sidewalk on the opposite side of the street.

Q. What did you observe? A. I heard a door open in the rear of the house and heard the sound of paper, sounded as though it was heavy paper, scraping across a hard surface. This occurred several times, and I then heard a heavy door slam; heard a door in the rear of the premises shut. In about two minutes the Dodge car driven by Scher was backed out onto the street and proceeded west along Drexel Avenue to East 105th Street. He then went down to Pasadena Avenue, where the car was driven into the gas station; gas was put in the car, and Scher left the car and went into a delicatessen store, where he bought a newspaper, returned to the car and then drove south along East 105th Street to Olivet Avenue, and he turned west on Olivet Avenue, at which point I endeavored to overtake the car. I was possibly half a city block back. I was driving a government car. Investigator Bowes was with me. Just before I reached the Dodge it swung into the driveway at 10025 Olivet Avenue, proceeded back into the yard, and into the garage. I stopped the government car at this point and saw Bowes leave and run into the driveway. In about two minutes I went into the driveway. There I saw

Scher in custody of Bowes. The back of the car, the trunk of the car was open, and I saw a large quantity of tax unpaid distilled spirits in bottles which bore labels of alleged popular brands of gin and whiskey. At this time Bowes formally placed the defendant under arrest and lodged him in the Bratenahl Police Station.

The car was heavily loaded when it backed out of the driveway at 12:30, although when it went in the car was riding normal. The first time I saw the car three women got into the car. This was about 10:30. The car wasn't excessively weighted down; the normal appearance of a car with four people in it. But the second time the car was heavily weighted down.

That night the streets were clear; they weren't icy. It was not excessively cold; I don't know exactly what the temperature was. The car was about a city block ahead of me when it turned on Olivet Avenue. When we followed the car from Drexel Avenue to the gas station we were about the same distance behind it, I would say probably six or seven hundred feet.

CROSS EXAMINATION by Mr. Doyle

It was in the early part of the evening I received the confidential information liquor would be transported in this particular Dodge sedan. It was about 7:00 o'clock. I considered the source truthful and reliable. If I had not so considered it I would not testify it was. I have the means of knowing truthful and reliable information when I receive it. At that time I had been in the service about 28 months.

Q. Did you receive any other information at any time since the 31st of December, 1935 to the present time, which you considered reliable concerning the actions of the defendant Scher? A. No, I did not.

Q. Did you receive any information which you considered reliable concerning his actions in Charleston, West Virginia?

Mr. Scott: I object, your Honor.
The Court: Objection sustained.
Mr. Doyle: Exception.

Q. Have you at any time received any information concerning Scher which you considered reliable information and later turned out to be unreliable, false and perjurious?

Mr. Scott: I object.
The Court: Objection sustained.
Mr. Doyle: Exception.

(Narrative continued) When the car first drove into the Drexel Avenue driveway I was parked in the government car about four or five houses immediately east. After the car swung into the driveway, I ran down to a point directly opposite the driveway. I was standing on the sidewalk directly opposite the driveway of the house at 10838 Drexel Avenue when the car was loaded. I didn't see anything put in the car. All I say is that I heard something. When the car came out I got in our car with Bowes. We followed the Dodge down to the gas station, and there Scher got out and left his car and walked across to a delicatessen, bought a newspaper, and came back. He wasn't out of the car more than three minutes. He was the only passenger in the car and he left the car. At that time we were parked directly opposite the gas station on East 105th Street, about 70 feet. I did not go over to inspect the car while it was in the public gas station. We remained in our car until he drove out and down Olivet Avenue. He drove from East 105th Street to what would be approximately 100th Street. He was driving about 35 miles an hour. He didn't have the appearance of running away from anyone. T re was nothing suspicious in his actions as to his driving. The car was very heavily loaded. When he drove in the driveway at 10025 he drove in in an ordinary way. He did not go over 15 miles an hour when he went in the driveway. That was a speed one would ordinarily turn in on a night such as December 31, 1935. He drove into the driveway and into the garage.

I have ascertained since that time that was the home of the defendant. I know his mother and father lived there, and there are some other relatives, sisters or brothers.

Inspector Bowes got out of the car before I did. When I got there Bowes was in the garage and had the man under arrest. It was not over two minutes from the time Bowes left the car before I met him in the garage. The defendant was then right at the rear of the car, and Bowes was right next to him.. The trunk was open on the top. It is a built-in trunk. As I walked up I saw several packages of liquor. That was not when I first walked up. As soon as I got into the garage I saw it. I then got all the packages open and found this liquor.

I received my first information about 7:00 o'clock in the evening. My informer told me that at about 12:30

a.m. on the morning of December 31, a Dodge car bearing license LX-418 would leave the premises at 10838 Drexel Avenue with a load of tax unpaid spirits in bottles. I don't recall whether he said "tax unpaid" or "phony" liquor. He used words which indicated it was not State store whiskey. I know the charge against the defendant is that he had tax unpaid liquor. I did not say my informant told me the car would transport "tax unpaid" liquor because I knew the defendant was charged with possessing and transporting tax unpaid liquor. The term "tax unpaid liquor" is a phrase in common usage among investigators engaged in the Alcohol Tax Unit.

I never had any other complaint against Scher; or any complaint or suspicion as to trafficking in liquor in the Olivet premises. I made an attempt to arrest the persons on the Drexel Avenue property. I did not arrest them.

RE-DIRECT EXAMINATION by Mr. Scott.

When the defendant drove in the premises on 10838 Drexel Avenue with his car the second time, I was parked about four or five houses east of 10838. He drove his car directly to what would be the rear door of the house. All I could hear would be the sound of the paper and removing of these articles. That was about 25 feet from the sidewalk where I was.

I took samples of each kind of liquor which we seized and they were transmitted to the government chemist at Detroit, Michigan, for analysis, and the balance were destroyed. There were no internal revenue stamps attached to the containers of the liquor.

RE-CROSS EXAMINATION by Mr. Doyle.

Q. Do you know what the defendant in truth intended to do with that liquor? A. I do not.

Q. You have no personal knowledge or information whether he had it for his own use or intended it for sale or not, do you? A. I do not.

SIDNEY M. BOWES, a witness called by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Scott.

My name is Sidney M. Bowes; investigator in the Alcohol Tax Unit for a little over two years. I was so employed on December 31, 1935.

On December 30, 1935, I was in the vicinity of 10838 Drexel Avenue where I observed movements of automobiles and persons beginning about 8:30 in the evening on till midnight and after. I first saw an old Chrysler car, I believe; I don't remember the license number on it. A Chrysler with no spare tire on it. It was there for a while, and after that, somewhere around 9:00 or a little after, I saw Dodge car license number LX-418, a green sedan. When I first noticed the car it was parked in the street in front of the place. At about 10:30 I saw a man I later identified as Hyman Scher, the last man on the far side of the table, drive that car away. He came to the car from the house, carrying a package of the same size and shape and color that I later seized from him. He had just one package. He placed that in the car, got in himself, and three women, who came from the house with him got in the car also, and he left.

About around midnight the car came in again, the same car. I don't know who was driving it when it came in. I saw it arrive at the premises, and I saw it proceed to the rear of the drive, and I saw three women, apparently the same three women who had left in the car, come from the rear of the house around and entered the front door. Another man was with them. I then went down and made further observations closer to the premises. It was a very cold night, snow on the ground, the garage doors of a single garage in the rear of the premises was open. This car had stopped at the rear corner of the house on the drive. The lights were out on the car.

I returned to Mr. Williamson in the government car a short distance, about 200 feet down the street, and saw Williamson come down in the vicinity of the premises and remain a few minutes, and then return and rejoin me. It was around 12:30 or a little later, perhaps, I saw this same car leave those premises. It appeared to be heavier with the one man, the driver, in it than it had when it had left and returned, with the three women in it.

I followed this car west on that street, and it turned north to a near-by filling station. We followed it, and as we approached it in the filling station Scher was in the act of leaving the car and an attendant apparently put gas in it and Scher returned to the car from a store across the street, got in it and drove away, and we followed. We followed it up the street, that is, up, I should

say south, several blocks and then it turned right. This was the car that we had information about would take a load of whiskey, as we called it "phony" whiskey, from the premises from which we had followed it; that was the reason for us following it. It turned up a side street. We were gaining on it then, the streets were slippery, and it then swung into a driveway alongside a house. Investigator Williamson was driving the car, and he slowed it in front of this drive, and I dropped out and went back in the drive.

The car had entered the garage, and I approached the car; his headlights were still on. Mr. Scher had just stepped from the car. I said, "I am a federal officer. We have a tip this car is hauling whiskey." And he said, "Just a little for a party." I said, "Is the tax paid on it?" And he replied, "It is Canadian whiskey." I said, "Is it in there?" And I pointed to the trunk of the car. And he said, "Yes." I turned the handle and opened the trunk and found the trunk completely filled with packages wrapped in brown paper, and tied with twine; I think somewhere around thirty packages, each one containing six bottles. We didn't examine them all then. I saw several of the bottles and noted that they contained spirits and that there were no tax stamps on them. We placed Mr. Scher under arrest and with other officers we took him and the car away. The car contained a total of 88 bottles of tax unpaid spirits. There were 36 bottles of those imitation Holland gin in a sort of jug bottle.

Mr. Doyle: I object to the words "imitation Holland gin."

The Court: Overruled. Proceed.

Mr. Doyle: Exception.

(Narrative continued) I don't recall the exact number. There were some imitation Vat 69, and some imitation of White Horse Scotch Whiskey. I believe there were two other types of bottles, the brand names I don't recall.

When the car first left the Drexel Avenue house we were approximately a third of a block behind it, and we just about maintained that distance until it went to the filling station. Of course it stopped there and we came up and arrived about opposite about when he was leaving, and we took a post of observation down the street, saw him come back, and when he left we were about 100 yards behind him. That varied as we gained on him.

When he turned in the drive at the house where he was arrested, I should say he was 50 yards ahead, more or less. I saw the defendant as the only occupant get behind the wheel at the gas station and drive away. I could see one person in it. As he went back to the drive, he was the only person in it, and behind the driver's wheel.

Neither the packages found in the car nor the bottles had any internal revenue stamps.

CROSS EXAMINATION by Mr. Doyle.

Our car was approaching the same corner when Scher drove down to the gas station. While he was out of his car across the street we moved by that corner. He came out of the car, went towards the opposite corner, and we continued by the station and took a position to the north of the station, awaiting his return. I should say perhaps 75 yards, more or less, north. We were not directly opposite, across the street. I remember testifying at a previous trial of this case. I testified, and it was a fact, that we parked our car on the opposite side of the street; but it was not directly opposite the gasoline station. Our position was on the west side of the street, on which the gasoline station stood, but it was not directly across the street; that is, at right angles to the gasoline station.

I received a tip that "phony" liquor would be hauled away from the Drexel Avenue premises in that car. We got some information about the place around 4:00 in the afternoon, and some in the evening. We got further information while we were out there, around 8:30 or 9:00. It came from a source that had previously given us reliable information, and considered by us reliable. We have means of knowing whether information we receive is reliable if we had a previous experience with information from the same source, as we had in this case.

Q. Mr. Bowes, will you tell us the name of your confidential informer?

Mr. Scott: I object.

The Court: Objection sustained.

Mr. Doyle: May I be heard on that?

The Court: No, sir. I will not hear you. That has been too often decided. I have decided it, as you know, and many other courts have decided that question should not be answered. I shall not re-examine.

the question. I have examined it again within the last 48 hours.

Mr. Doyle: May I dictate my offer?

The Court: Certainly.

Mr. Doyle: The defendant proposes to show by this line of cross examination that the witness received information which he considered reliable at the former trial by producing two witnesses who testified concerning the movements of the defendant Scher, which testimony later developed by an investigation by the Attorney General of the United States to be false, perjurious and unreliable.

(Narrative continued) As the Scher car left Drexel Avenue it started from a stop, of course, gradually increasing speed to the corner, and as it proceeded down to the gasoline station it had probably reached a speed of 25, 35 miles an hour. It would be impossible to get up excessive speed in the distance. There was no movement he made other than the man would make going from one place to another. There were no suspicious movements that he made with his car. After he filled with gas at the station I should say he may have reached a speed of 40 miles an hour. He gradually reduced speed until he got to 10025 Olivet. It seemed like a rapid swing in the driveway, but nothing in particular. It was a glimpse I had as he went into the driveway. The man was, I should say, 25 or 30 yards ahead of me, and swung in there, I should say a rapid swing, a right angle turn on a slippery street, didn't skid any. That is as near as I can describe it. He could not have maintained his direction at 15 miles an hour on those streets, I don't think; it was less than 15. There was nothing suspicious in his turn in the driveway. He drove in and drove into his garage, which is about six feet from the house. I didn't know at the time it was his home.

As he drove in and got out of the car I approached. He was standing at the back of the car, I believe. I told him I was a federal agent and had a tip he had some "phoney" liquor with him. I asked him if it was in there, pointing to the trunk. I opened the trunk. I don't think it was locked; it opened easily with my hand. There was a handle right in the center of the trunk. I just turned it and opened it. I didn't need any key to open it. After that I arrested him and went out to Bratenahl station.

Up to that time I had heard nothing about trafficking in liquor at that address. I had never heard anything

about Scher. This is my first experience with him. I hold no animosity towards him personally, none whatever. I am interested in the prosecution of the government.

After the first trial of Scher I further investigated his activities. To that end I proceeded to Charleston, West Virginia.

Q. And did you procure some information which you considered reliable and confidential concerning Scher's activities?

(Objection; sustained; exception.)

When we arrested Scher there were 88 bottles in the trunk and two on the seat.

RE-DIRECT EXAMINATION by Mr. Scott.

In following Scher over to Olivet Avenue I tried not to give him any indication we were following him.

Mr. Scott: We rest, with this exception. Mr. Doyle has stipulated that the liquor seized at that time was distilled spirits made for beverage purposes.

The Court: It is stipulated that the liquor seized is distilled spirits fit for beverage purposes.

Mr. Doyle: Now, if the court please, the defendant moves for a directed verdict.

The Court: I will not hear from you. You may save your point. Your motion is overruled and you may have an exception.

Mr. Doyle: Motion for directed verdict on the ground no venue has been shown.

The Court: We will not, of course, have that small matter bother us in the future. If you insist upon it, the case will be opened up and one of the agents take the stand.

EARL WILLIAMSON, being recalled, testified as follows:

This seizure of the liquor and transportation of the liquor happened in the city of Cleveland, Cuyahoga County, State of Ohio.

The Court: Was that the only ground of your motion? If it was, you had better add some other ground, I suppose, now that that is covered.

Mr. Doyle: We further move for a directed verdict on the ground that no offense has been shown to have been committed.

The Court: Motion overruled. The defendant has his exception. (Exception by defendant.)

DEFENDANT'S TESTIMONY.

Herman Scher, a witness called by defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Doyle.

My name is Herman Scher. I live at 10025 Olivet, Cleveland, and am the father of the defendant here. I have lived in my home at Olivet 17 years. Living there with me at the present time are Hymie, Willie, Ernie, and Edith, also my wife. The same children lived there December 30 and 31, 1935. I was at home the night Hyman was arrested.

In the house we always drink whiskey, all, the whole family.

Q. Was six cases of whiskey a reasonable or unreasonable or customary or uncustomary amount of liquor for you to have in your home? A. No.

Q. What is the practice in your home: What was it at that time in December 1935 as to entertainment? A. At that time I had two cases in the house.

(Narrative continued) We did a lot of entertaining. I entertained and the children. I have only one other son who lives in the Heights, is married and has a family. He would entertain in my home. We do the most entertaining Saturday nights and Sundays, some times the middle of the week. On Sunday we would have from 20 to 30 people, some times more.

On the New Year's Eve party there were over 60 people. Liquor was served at our various parties.

We never go to cafes and restaurants; we always party at the house. We sit and talk and drink and dance. There is no drunkenness there.

There was never any liquor for sale in my home at 10025 Olivet Avenue. My son Hymie, the defendant, never sold any liquor that I know. I did not know of his having any at home or elsewhere for sale, or for the production of any products from it; never sold a drop in his life so far as I know.

CROSS EXAMINATION by Mr. Scott.

At these parties we had from 20 to 30 people. We have parties Saturday and Sunday, some times in the middle of the week. There was a reason for those parties because I belong to a society they call "Good time Society." They have good times, eat and drink and sing and dance. We pay for the parties myself, because every week we go to a different house. In that lodge is 150 couples. I don't have the whole bunch, only the executive board members.

We have an eight-room house. That is the upstairs and three rooms on the third floor, on the attic. I live on the second floor. A family named Prottman lives on the ground floor. He is no relation.

Sometimes we would have forty people, board members there. There was liquor served. There never was drunkenness in the house. We would have two or three cases of liquor on hand to serve forty people. We would get rid of all the liquor at one time. They would drink it all but there was no drunkenness. We put all these people on the second floor. I never testified we had as many as 150 people there at one time.

I was home the night the federal officers came there and seized the car in the garage; it was 12:30. They didn't come in the house.

MRS. LILLIAN SCHER, called as a witness by defendant, and first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

I am the wife of Irving Scher and brother-in-law of Hyman Scher, the defendant. I live with my husband at 2477 Overlook Road. On December 31, 1935 my husband and I lived at 10025 Olivet. Living at that time at that address besides myself and my husband were my mother-in-law, my father-in-law, my brothers-in-law Hyman and William, and my sister-in-law Edith: seven in all and one servant, a maid who slept elsewhere.

On the night of December 31, 1935 there was an entertainment planned for the Scher home. There were present ten of our immediate family, and during the course of the evening there were 90 or 100 people there. A few of them didn't stay there long, but I would say during the whole course of the evening about 60 or 70 stayed the whole full time of the party. There was the ordinary procedure at a New Year's Eve party,—ate,

drank, danced, played musical instruments. My mother and father were there.

I lived at the Scher home on Olivet from June 23, 1935 until January of this year. We were married June 23rd and moved in there then. I had known the Schers seven years before that and would visit there very frequently, two or three times a week.

Q. Can you tell us what the general custom in the Scher home was in December, 1935, and some time previous and thereafter as to entertainment? A. There was a lot of entertaining at the house always, especially after I was married.

Q. And how many people usually would attend those parties? A. It all depends on the nature; whether we were having a card game or just a social event having the family and friends over. My in-laws are very cordial people and there is always a lot of company.

Q. How often would these parties take place? A. I would say two or three times a week on an average.

Q. They would consist of friends, business acquaintances? A. Yes, sir.

(Narrative continued) The defendant was then in the hat business at 1102 Prospect with my husband, the New England Hatters. Samuel Scher and Willie Scher were in the automobile business. The father, Herman, used to help my husband in the store. When he wasn't needed there he would help around at home. He is now in the drygoods business, has a little store at the market.

The custom of the Scher children was not to frequent movies, roadhouses, but we always entertained at home and had our drinking at home.

The New Year's party started at ten-thirty and eleven. There was liquor served then. My husband and Hymie were to arrange to get liquor for the party. I don't know where they got it or what arrangements were made.

Cross Examination by Mr. Scott.

Before I was married I wasn't at the Olivet Avenue home all the time but a lot of the time. After I was married I lived there all the time. I was at most of the parties held when I lived there. They were in the evening on week ends and during the week. Generally there were twenty or thirty people there, sometimes maybe forty or fifty. New Year's Eve in 1935 there were surely 100 people there during the course of the evening.

This is a nine-room house; it is a large place. I would say there was about two cases of liquor consumed New Year's Eve. I believe there was a case in the house and I think, I am almost certain, that Sam, my brother-in-law, brought some, and then of course some of the guests had some with them. There couldn't very well be any drunkenness there, not with that many people. My husband and my brother-in-laws were supposed to contribute towards the party and towards the liquor and refreshments. I didn't pay any money towards it; my husband takes care of my finances.

Entertaining was the purpose of all these parties. After I was married I owed a lot of people invitations who were very nice to me before we were married. My husband is in a business where he deals with men and it is very common to be very cordial, invite them over and be friendly with them. He deals with men almost entirely in his business. It is very natural to say to a good customer or acquaintance of yours, "Drop over and have a drink. Come over some night and play some cards." That is only natural.

I couldn't say how much liquor there was in the house every time there was anyone there, but we always had liquor in the house. The boys bought some from time to time. My brother-in-law Sam, being in the automobile business, would occasionally make a deal on a car where he would take in liquor as part payment. That was legal liquor.

On New Year's Eve 1935 I am positive there was at least two cases of liquor, and that would be 24 bottles. Then there was some brandy; besides a few some of the guests brought out with them. I saw that many bottles about eleven or eleven-thirty. As to them being all filled, you don't pay particular attention to a thing like that. I can't say whether they were all filled at that time.

By the Court:

Q. What do you say as to the custom in your father-in-law's home about using illegal liquor for these parties: any such custom as that? A. No, sir.

Q. That never happened? A. No, sir.

RE-DIRECT EXAMINATION by Mr. Doyle.

Illegal liquor would be liquor that is made contrary to the laws of the government and without the taxation that is applied or imposed upon it. I don't pay partic-

ular attention to see what kind of liquor I am getting. I felt over the cap the stamps, things of that kind.

DR. JOHN J. COAN, a witness called by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is Dr. John J. Coan. I am an osteopathic physician and surgeon in the Osborn Building, residence 3428 East 147th Street. I have practiced here sixteen years.

I have known the defendant eleven or twelve years. I know what his general reputation is in the community where he resides as being a law-abiding citizen. I would say that general reputation is good.

CHARLES KEELSON, a witness called by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is Charles Keelson; address 20808 Mayfield Road. I am manager of the Knobby Clothes Company at 1044 East 105th Street, and have been so engaged the past twenty years.

I have known the defendant about eight or ten years. I know what his general reputation is in the community for being a law-abiding citizen. That reputation is good.

SAMUEL SCHER, a witness called by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is Sam Scher; residence 12378 Reynard, University Heights. Since 1928 I have been an automobile dealer here in Cleveland. I am a brother of the defendant.

It has been eight years since I lived at 10025 Olivet, since I married. Previous to that I lived there.

Q. Do you know what the general custom was in the Scher household on Olivet Avenue as to entertaining? A. Well, we always have had entertainment there, business associates; we used to have friends.

Q. Who would do the entertaining? A. Well, we would all do it. I would do some of it; my other brothers, and my dad.

Q. How often, as a general custom, would you have entertainment? A. I would say there was always somebody over; usually on Saturday and Sunday we would have quite a crowd of people there.

(Narrative continued) We always done our entertaining at home. We didn't frequent roadhouses or cafes very often; once in a great while. At the entertainments at the Scher family home on Olivet there would be thirty, forty or fifty people there at one time. There has been close to a hundred. They would be friends, acquaintances, relatives, club members. We would have good times. We would serve lunch, serve little drinks, and have singing and dancing.

We have always had liquor in the Scher home. It wasn't unusual to have six or seven cases of liquor at one time.

I remember the occasion of my brother's arrest on December 31, 1935. In the evening of December 30th there was an arrangement with Hyman about the purchase of liquor. I think it was between nine and nine-thirty that Hyman came to our house. At that time I lived on Euclid Boulevard. He told me I could buy some liquor cheap, if I would entertain the idea of going in and buying it with him. We always have been doing the same thing. And I told him O.K. I asked him if the stuff was all right. He said it was all right. I said, "Go ahead and buy it." He said, "Have you any money?" I said, "Yes. How much do you need?" He told me I should give him as much as I can. I think I had $50 or $60. I gave it to him and told him to go ahead and buy it, and told him to take it to the house; we were going to have a party the next day and have use for it. That is all the conversation pertaining to that particular deal. We had bought liquor in quantities before, sometimes as high as ten cases. Pardon me, that was taken in on deals they have made on automobiles.

We are in the automobile business; we sell cars to everybody. A lot of times these fellows would come in and want to know if we would trade a car or take the down payment in whiskey. When we took that liquor in it would be sent out to my father's house and we would consume it at the house. That was the general custom; we kept all our liquor there. We did all our entertaining there.

CROSS EXAMINATION by Mr. Scott.

It was on the 30th, not the 31st, we were going to buy some liquor, about six or seven cases. I don't know where we were going to buy it. All I know is my brother told me he was going to buy some liquor and I was going to share in the cost. It was to cost around $150. I had either $50 or $60 I was going to give him. It was supposed to be good whiskey; either six or seven cases. I would consider that good liquor at that cost. There were state stores in existence at that time. He didn't say he was going to buy the liquor at a state store.

Q. So you knew at the time he was going to buy improper liquor?

(Objection; overruled; exception.)

A. No, I didn't.

Q. If you didn't know the liquor was going to be bought at the state store, where did you think it was going to be bought? A. I didn't know.

(Narrative continued) I don't know right now how much liquor costs in a state store in cases.

It was not my general practice to take in liquor in exchange on automobiles.

I was at this New Year's Eve party with my wife and friends. On and off there must have been pretty close to a hundred people coming and going. I really don't know how much liquor I observed at that time.

This is a pretty large size house—eight or nine rooms. We didn't have anybody outside to handle the traffic, all these people that came there. We should have called the policeman but we forgot.

WILLIAM SCHER, a witness called by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is William Scher; residence 10025 Olivet. I am in the automobile business; Boulevard Motor Sales, 117th and Euclid.

Q. Do you know what the general custom is in the Scher home on Olivet Avenue as to entertaining and having parties? A. Yes, sir.

Q. What is the general custom there as to parties and entertainment? A. Well, we generally have parties there twice a week, mostly on Saturday and Sun-

day, and we entertain. We have a lot of friends here and relations we entertain during the course of the evening. There would generally be about 35 or 40 people, sometimes a little less, maybe a little more.

Q. Any of the Scher children make a custom of entertaining or going to roadhouses or cafes? A. No, they don't.

Q. You do your entertaining where? A. At home.

(Narrative continued) It is not out of the ordinary to have five or six cases of liquor in the Scher household at any time.

We had a party New Year's Eve of 1935. There were a number of people there.

I never heard of any liquor being sold at that place. I never heard of Hyman being engaged in selling liquor or interested in the manufacture of any articles containing liquor.

CROSS EXAMINATION by Mr. Scott.

I was there at the first part of the party on December 31, 1935. I was there around an hour or hour and a half and I left. When I was there there must have been close to about a case of liquor. I would say that in round numbers. I don't know the exact amount. I think we had that liquor in the house. I don't know where it was bought. I never knew where the liquor came from. I didn't pay for any of the liquor.

It was the following morning I heard about my brother being arrested. I knew the kind of car he was driving; license LX-418. That car was in my name at that time, the bill-of-sale. I didn't sign the name William Scher on the bill-of-sale but I authorized it. Hyman, the defendant, signed it. He asked me if he could buy the car in my name, I said O. K. He was my brother. I don't know why he couldn't buy the car in his own name.

I didn't know of my brother Hyman being engaged in any illegal liquor transaction about that time.

I wouldn't call the drinking there heavy drinking. When we have this entertainment everybody has a few drinks and they feel good. As far as drunkenness, there is not anybody gets drunk.

Some of the men who belong to the club my father belongs to were there that night. These people have what they call a standing invitation to our house. I don't know who pays for the liquor they drink. I don't know whether my father pays for it.

IRVING SCHER, a witness called by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is Irving Scher. I live at 2477 Overlook Road. I am owner of New England Hatters, men's hatters, at 1102 Prospect Avenue. I am in the business of renovating and making men's hats and have been so engaged the past three years. I was once associated with Danbury Hatters and Bill Taylor Hat Company.

At one time my brother, Hyman, was my partner, but he is not now. He left when he got the job with Jonas & Company.

On December 31, 1935, I lived at 10025 Olivet Avenue with my parents. I am married, and my wife is Lillian Scher. Prior to December 31 I had lived on Olivet 14 years. I know the general custom of the Schers as to entertainment. W did quite a bit of entertaining. That was practically every Saturday and Sunday. We would have a few drinks and sing and dance and play the piano, play the violin; everybody having a good time. There was never any liquor sold there to my knowledge. I never knew of Hyman Scher selling any liquor.

It was not unusual to have as much as five or six or seven cases of liquor in the home at Olivet. My brothers Sam, Hyman and myself would buy it. Sometimes I didn't have to buy it. They all drank in a moderate way.

I recall Hyman's arrest on December 31, 1935. It was about ten or ten-thirty in the evening of December 30 my brother Hyman came home and he brought a case of liquor up with him. He removed a bottle and asked me to taste it, see whether I liked it. I had one taste and I said, "That is pretty fair." He told me he can get a pretty good buy; he can buy six and a half or seven cases of liquor. I didn't ask him where. My brother said, "I have just come from my brother Sam's house and Sam is contributing some of the money to help buy the liquor." He asked me if I could. I said, "Yes." I think I gave him about $40 or $42. I contributed to buy the liquor, and he went away. He is to bring it back to the house. We were having a party that night—rather New Year's Eve, and it was to be used for that party and other parties, we usually have on Saturdays and Sundays.

CROSS EXAMINATION by Mr. Scott.

As to the circumstances of my family in December, 1935,—I wouldn't call them poor. I wouldn't call them rich. We managed to stay out of the bread line, if that is what you mean. It is true we had 48 bottles of whiskey at one time in our house. I meant we were living moderate. After all, I had a business, I was making a living out of the business. My brother Sam was working. There was many times my brother Sam was taking liquor on an automobile deal; and that would be brought over to our house.

My brother Hyman was in partnership in my business. We were making a living. Hyman was in the dress business. He lost the business. His credit was no good. That is why he bought the car under my brother's name.

I was at the party on December 31, 1935. I imagine, all in all, I am not a very good guesser of people, didn't stop to count them, but there was very close to a hundred people there during the whole evening. By that I mean there were times people came in, wished us Happy New Year, and had a drink and walked out. I mean there were not a hundred there all assembled. I was there all evening. We had a case left there the night previous by my brother Hyman. That was the case we took that bottle of so I could taste it. I didn't stop to look at it to see whether it was legal liquor. Legal liquor is liquor that has the government stamp on it; internal revenue stamp attached on the bottle. I didn't stop to look whether there were any internal revenue stamps on the bottles. He didn't say anything to me about where he was buying it; I didn't ask him. He said he could make a good buy.

EDITH SCHER, a witness called by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is Edith Scher. I am a sister of the defendant and live at 10025 Olivet Avenue. I have lived there 17 or 18 years. My business is that of sales lady at the Bailey Company and I have been so engaged a year and a half. I am 24 years old.

Q. Do you know what the general custom was in your house as to entertaining? A. Yes.

Q. You tell the court and jury just what your custom was; who would be there? A. Well, maybe once or twice or even three times a week our friends, family and relatives, would get together. That would be Saturday night or Sunday night, or once during the week. We would play cards, serve a few drinks, just have a nice time.

(Narrative continued) To my knowledge there was never any liquor sold at the Olivet Avenue home. To my knowledge Hyman never sold any liquor, engaged in any liquor sale.

We Scher children very very seldom go to roadhouses or cafes. We would rather enjoy ourselves at home. We have our entertainment at home. It was not out of the ordinary to have four or five or six or seven cases of liquor in the home on Olivet Avenue at one time. My brothers would get together and they would all pitch in and buy it.

We had a party New Year's Eve. There was about sixty people there all the time; close to a hundred walking in and out. The party lasted till about five or five-thirty. We danced, drank, played cards, talked. There was no drunkenness or anything like that; just sat around all evening and sang.

Cross Examination by Mr. Scott.

I work in the day time. I was at the party on December 31, 1935. At one time there were sixty people there, but there was people walking in and out, I would say there were close to a hundred. I saw liquor there, but I don't know how much. I didn't count it. There was plenty of liquor there.

Hyman Scher, the defendant, offered himself as a witness, and being first duly sworn, testified as follows:

Direct Examination by Mr. Doyle.

My name is Hyman Scher. I am the defendant in this case; am 29 years old; and live at 274 Shady Avenue, Pittsburgh. I am manager of the Jonas Shop there, dealing in ladies ready-to-wear and millinery, on Fifth Street. They have a chain of stores, about 23 in the western chain.

On December 31, 1935 I lived at 10025 Olivet Avenue. I was with my brother in the hat business at 1002 Prospect. I am single but I am contemplating marriage.

On December 31, 1935 I was arrested by officers Williamson and Bowes. I had with me seven cases of liquor. I bought that at 10838 Drexel Avenue, Cleveland, from a fellow by the name of Carr.

During the day I got into a conversation with some fellow down in the store. He said he knows where I can get some good whiskey. He went out to the Carter Garage and called and made an appointment, gave me the address to go out there. I told him I would be out there at a certain time. I went out there at nine-thirty. When I got there Mr. Carr stated he is going out of business and has an exceptional buy for me if I am interested. He said he has about seven cases and would give them to me at about 22.50 a case. I said I didn't have that much money but I think I can raise it between my brothers because we always go in partners. I took a case along with me, took it over to my brother Sam, told him about it. He gave me about $60. I stood around talking and then went over to my home to Irving, and I told him. We sampled the bottle. He thought it was good and he gave me about $40. I had the balance. I went back there. First I stopped to eat on East 105th Street there, kidded with some of the fellows there. I went back there about twelve o'clock. They told me to drive in this driveway, and I drove in and I got out and then I went in the living room. He loaded the car up for me and I paid him the money. I backed out and went down Drexel Avenue, went over to the gas station, got some gas, went across the street to buy a paper, got back in my car and I went home.

The liquor was in the trunk of my car, and the trunk was unlocked. I wasn't in a hurry and going down there I went at just a leisurely speed. After leaving the gas station I went directly home. I went into my garage. As I got out I see some fellow running towards me with a searchlight waving from side to side. When he gets up to me he says, "I am an Internal Revenue man. Have you got some whiskey here?" I said, "Yes, I have some whiskey for a party." He opens up the trunk. He took the lid right off the trunk and there is where the whiskey was. Then he took me out in Bratenahl. I was overnight in jail there.

Q. What was the general custom at your home as to entertainment? A. Well, we have done a lot of entertainment. Father had people to this Good Time society where they have their executive board meetings over there as his friends. Brother Irving is in business. We

are in the hat business, we have friends and they were always coming in. We have good times there, always have a few drinks, serve a little lunch; just get together all the time.

Q. What was the custom,—did any of your brothers and sisters or brother-in-laws and sister-in-laws go to roadhouses? A. We don't. We always think we would rather congregate at our house, because all of my brothers are musically inclined; one plays the violin, William plays the piano; we always gather there and have just as much fun.

(Narrative continued) There were usually twenty or thirty people there. At my brother's wedding reception there was about 150. He was married at our home.

There was nothing unusual in having five or six or even seven cases in the home. Sometimes we had much more. My brother would sometimes take whiskey in on deals in automobiles, bring it over to our house. One time he took in about ten cases on a deal. That was brought to our home to drink. It was for the family and friends that would come over.

Q. Did you ever in your life sell a single case of liquor? A. No, sir.

Q. Did you ever sell any liquor at all? A. No, sir.

Q. When this liquor was purchased did you purchase it intending to sell it? A. No, sir.

Q. Did you intend to use it in the manufacture or production of any articles for sale containing liquor? A. No, sir.

CROSS EXAMINATION, by Mr. Scott.

The car I was driving on December 31, 1935, was in my brother William's name. I did that because I was in the dress business at one time and after I had a robbery there my credit wasn't so good to warrant a new automobile. My brother's credit was all right. I asked him for his permission to buy the car. He said O. K. After all we were all together, it didn't make any difference in whose name the car was.

When I bought the liquor on December 31, 1935, I didn't pay any attention whether there was any internal revenue stamps attached to the bottles. I didn't know at that time that legal liquor could not be bought any place but in a state liquor store. I know there were state liquor stores.

Q. But you don't know liquor sold outside of state liquor stores was illegal?

Mr. Doyle: I object. It is not the law.
The Court: Overruled.
Mr. Doyle: Exception.

Q. I say did you know that the liquor that was sold outside of state liquor stores was, without internal revenue stamps, illegal? A. No, because this fellow said it was Canadian whiskey; he said it was Canadian bonded whiskey.

Q. So you thought it was bona fide liquor? A. Yes.

(Narrative continued) I was paying $145 for this liquor, for the seven cases. I said I was going to take that liquor over to Olivet Avenue for entertainment purposes. That is my home. There must have been about a case there before I went over to Drexel Avenue.

That night people came in; we didn't sit down and count them, but we expected a goodly number of people, probably about 75 to 100 people coming in and out, not congregating all at one time. The reason we bought the whiskey, the fellow sold me on a deal, because I went over originally to buy one case. He said I could get this very cheap. That is the reason I went ahead and purchased the whiskey. At that time my financial situation wasn't very good as far as credit was concerned. Credit is entirely different than money in your pocket. You can have money in your pocket and your credit won't be any good, when you default or something.

I considered this liquor a good buy. As to not knowing there were any internal revenue stamps on the liquor, —as I told you the fellow told me it was Canadian bonded whiskey.

Q. And the liquor you had been buying before for the other parties you speak of, where did you get that liquor?

Mr. Doyle: I object, if the Court please.
The Court: Overruled.
Mr. Doyle: Exception.

A. Got it from some fellows, certain fellows I would call up. I had the phone number of some fellow out on Kinsman.

Q. You don't know who it is? A. The name is Tony. I don't remember the phone number.

Q. You bought liquor on several occasions before this off of different people around town? A. Yes, whenever a fellow would come in the store I would buy some when I would happen to meet him some place.

Q. Would they be bootleggers? A. That I don't know.

Q. Do you know whether they were selling legal liquor? A. They always told me it was Canadian bonded whiskey.

(Narrative continued) At that time I was wo[illegible]ng at my brother's, New England Hatters, getting $25, $30, all depends. We withdraw whatever we felt we needed. If we needed more we would withdraw more.

The night when I left the house at Olivet on December 31 I returned and talked to my brother Irving with regard to buying the whiskey at a bargain. He gave me some money. I thought it was a good buy, I knew state liquor stores were in existence but I am coming back to tell you I was told this was Canadian bonded whiskey.

The Court: What does that mean to you?

The Witness: To me, it meant it was good whiskey.

RE-DIRECT EXAMINATION by Mr. Doyle.

At my dress store I had a robbery and after that robbery I just couldn't make a go of it any more. They took all my merchandise in the robbery. That store was at 965 East 105th Street, Cleveland.

Defendant rested.

Plaintiff rested.

The above and foregoing was all the testimony offered and received at the trial of the above entitled cause.

Thereupon adjournment was taken to the following day, whereupon arguments were had by counsel for the respective parties, and the court charged the jury as follows:

WEST, *J.* (Orally):

Members of the jury, the statute under which this indictment is drawn provides that no person shall transport or possess, buy or sell, any distilled spirits unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal taxes imposed on such spirits. The provision of this

section does not apply to distilled spirits not intended for sale or for use in the manufacture or production of any articles not intended for sale.

The indictment charges that on December 31st, 1935, in this jurisdiction, the defendant knowingly and unlawfully possessed, in a Dodge sedan, License LX 418, a quantity of distilled spirits, being about twenty-four quarts of gin and thirteen and one-fifth gallons of whiskey, the immediate containers of which did not have affixed thereto stamps denoting the quantity of spirits therein and evidencing payment of internal revenue taxes, in violation of the provisions of the section which I have just read to you.

Count 2 charges the defendant with the unlawful transportation in the same Dodge sedan of the same liquor in unstamped containers.

The defendant has pleaded not guilty, and is presumed to be innocent of both of these offenses. You will not be justified in finding him guilty unless the evidence satisfies you of his guilt beyond a reasonable doubt. Proof of guilt beyond any possible doubt is not required, but only proof beyond a reasonable doubt. That is, you must be satisfied, before you can find him guilty, that the evidence proves such guilt to a moral certainty. If the Government's proof does not convince your minds to this degree, or if the defendant's evidence raises a reasonable doubt of his guilt, then you shall acquit him.

No presumption arises against the man because this indictment has been returned and he has been tried upon it.

The defendant admits, and the evidence clearly shows, that on the night in question he did have in his possession, and did transport as charged, the liquor named in the indictment; and it appears that the bottles did not bear the stamps required by law. The first question of fact for you to decide is whether the defendant knew before the officers searched this car that the ninety bottles in the car were unstamped. He says he did not. But, notwithstanding that, the other facts and circumstances disclosed may convince you that Scher is falsifying; that he did know and must have known that this was illegal liquor on which the tax had not been paid, and, consequently, that no tax stamps were on the bottles. You are to weigh his assertion that he did not know against other evidence and circumstances, if there are any, tending to prove that he must have known, and

from all of the evidence are to determine where the truth lies.

Hyman Scher is of mature age, intelligence, and was in business with one of his brothers. In December, 1935, he testifies that an unknown man, whom he knew only as "Joe," I believe, came to the hat store and told him that good liquor was to be had at a certain address on Drexel Avenue, at a great bargain; and that when the defendant showed his interest in the matter, this unknown man went to the telephone, and, as I remember, made a "date" for the defendant to visit the party on Drexel Avenue. He says that he drove out that night and went to the place and interviewed a man named Carr, who told him he was selling out his business and could let him have seven cases of Canadian bonded liquor at a very low price, $22.50 a case, and he says that as he and his family were much given to generous entertainment, and were planning to hold a party for the next night, he thought well of this offer and so took a case as a sample, loaded it into his automobile, and drove to his home on Olivet Avenue to get his brother's opinion, and that there the whiskey was sampled and its purchase decided on.

At this point a matter appears which you should consider. The officers, or one of them, testified that when the Dodge car first appeared at the Drexel Avenue place, it was not driven in but was parked in the street. The driver entered the house and shortly emerged with a package like those later found in the car, but that there were a great many of these packages in the car,—some thirty, I believe they said. So that if this is true, and I believe Scher did not deny it, one package might not contain twelve bottles, for the whole number of bottles found in the car was ninety, and a case is said to contain twelve bottles.

Again, the officers say, and it is not contradicted, that three women came from the house with Scher and drove away with him and returned with him when he returned. Now, the defendant says nothing about these three women, and it may seem strange to you that if he did, in fact, drive to see his brother, and take the liquor to him for inspection, neither he nor his brother have remembered, or at least have not given any account, of the three women; nor have any of the women been produced to contradict these witnesses,—to corroborate these witnesses. Of course, it is possible they may just have gone for the ride and remained in the machine while the

defendant took the whiskey into the house on Olivet Avenue to exhibit it to his brother, who knew nothing of the women being outside in the cold. That would explain the brother's failure to mention that, but would not, as I see it, account for the failure of the defendant to either produce them and have them tell where he took them and so substantiate the story of the visit to the brother, or else explain why they are not produced.

The Government is not shown to know who these women were or to be able to produce them. The defendant and his counsel would hardly overlook a matter so vital to the defendant,—I say "vital," because Scher and his brother both testified that it was when the defendant brought the sample case to their home on Olivet that the purchase of the seven cases for the New Year's party was decided, and it was there that the defendant secured funds to help pay the price of $145.00, and any evidence that such a visit was made would tend to corroborate that.

While the failure to produce corroborating testimony or account for its absence may well be thought by the jury to cast a grave doubt upon their story, the effect, of course, of these discrepancies, if you find they exist, is entirely for the jury to decide.

Now, getting back to the question whether Scher knew the bottles were not stamped: if you accept the testimony that he did take a case to his brother, then it appears that a bottle was opened by them and one or more drinks taken, and, although the testimony shows that these stamps are applied to the cork, Scher insists he did not notice the absence of the stamps. Again, you should consider that the two trips to the Drexel Avenue house were made at night to get a bargain at a private home, and not a lawful liquor store. Now, under those circumstances, was it at all probable that the defendant expected this bargain price liquor to be lawful liquor on which the tax had been paid?

He said that Carr assured him it was Canadian bonded goods, but it seems to me evident that Scher did not understand from that that it would be tax paid, for he testified that to him "Canadian bonded whiskey" meant simply whiskey of a good quality.

From all of the testimony bearing on the point, and giving effect to the reasonable inferences to be drawn from such facts as are either admitted or proven, what do you say? Did the defendant know and appreciate that the bottles were not stamped? If he did not, your ver-

dict must be not guilty; but if he did, then you should consider the affirmative defense which the defendant also advances.

The statute involved here which prohibits possession or transportation does not apply to distilled spirits not intended for sale or for use in manufacturing or producing articles intended for sale, and it is the contention of the defendant and his counsel that the defendant bought this liquor not for sale but for the use of himself and his family and friends, and, consequently, that the statute has no application to him. This may be called an affirmative defense, and upon this issue the burden does not rest upon the Government, but the defendant has the burden of showing by the greater weight of the evidence that although the taxes had not been paid and the containers bore no stamps, yet the statute did not apply against him because he did not intend to sell the liquor or use it for making some article for sale.

The law is that when one is found transporting distilled liquors in unstamped containers, and, therefore, prima facie committing an offense, he would be required to explain why he should not be regarded as a violator, and the burden of proof rests on him to make a satisfactory explanation by proof to a jury that the spirits were not intended to be sold or used to produce articles for sale. He is not required to prove this beyond a reasonable doubt, but he is required to prove it by the fair preponderance of the testimony.

Now, Scher testifies, and in this he is supported by several members of his family, that he had this liquor solely for their personal consumption and entertainment of their guests. The Government, in the nature of things, cannot produce direct evidence of the man's purpose and intention when he bought the liquor. As in most such cases, the Government relies on circumstantial evidence, which may properly be received and considered by the jury in this case. Among the circumstances to be considered are the time, place, and the nature of the place, and the method employed in securing the liquor.

Scher was using an automobile bought by him in his brother's name and licensed in the name of his brother. He has an explanation for that, which you will consider, giving it such weight as you think it is entitled to. He acted on information from a man said to be unknown to him. He drove to this private home in the night. He left with three women, and Scher returned, drove into the yard to get the load, but extinguished the

lights on his car while it was being loaded, and bought seven and a half cases, or ninety bottles of liquor put out in unstamped bottles, marked and labeled as being very well known brands. Would a man, or three men, in the situation of the Schers, be likely to spend $145.00 at one time for liquor for their friends and family, when they then had, according to the testimony, at least a case available for use in their house?

The Government does not claim that any one of these circumstances disproves Scher's assertion, but it does contend that when they are all taken together, they do refute it.

It is not contended that the defendant expected to sell this liquor at his home on Olivet; that a bootleg joint was conducted at this place. If the defendant, in other words, was to sell, it would make no difference when or where or to whom the proposed sales were to take place; and of course you all appreciate that bootleggers oftentimes ply their trade in various ways without having any fixed location for the operation of their business.

You will also consider the testimony as to the habit of entertaining at the Olivet Street home. I need not repeat that evidence. Just how much truth or probability there may be in it, in the testimony of the father and the others of the members of the family upon this point, is for you to say.

And as to all of the testimony the jury is the sole judge of its weight. So, too, you are to judge the credibility of the witnesses. In general, you may consider the appearance and demeanor of the witnesses; his frankness or lack of it; the reasonableness or unreasonableness of his story; and the interest he has in the outcome of the case; whether, because of relationship to the defendant, or otherwise, and from all of the testimony touching these matters, it is for the jury to say just what weight, if any, you will give to the evidence of any witness. But, more specifically, if you find that the defendant, or any other witness has wilfully and knowingly testified falsely to a material matter, you may disregard all of his evidence. For example, if when the defendant testified that he did not know that the containers of the liquor were not stamped, he wilfully testified to what he knew to be false, you have the right to reject not only that evidence, but all of the rest of his testimony, as well.

I have followed the custom in Federal courts to briefly relate to the jury some of the more important testimony,—not to interfere with your function as triers of

the fact, but only to help you to remember and apply that evidence, for you are the sole judges of facts and are not bound to follow any view of the Court as to them; and you should consider all of the evidence, not merely that of which I have spoken. And if your memory differs from mine, you are to take the testimony as you recall it.

You must not be influenced by any bias, prejudice or sympathy, either for or against the defendant. For example, he testified that he expects to be married soon. Whether that was intended to arouse your sympathy, I do not know, but at all events, the defendant's matrimonial plans and the probability of it being interfered with are not to be given any consideration or any weight whatever by this jury. It is not concerned with the result of the verdict or how it will affect the defendant, or anyone else.

The evidence has been received to show the defendant's good reputation. Such character evidence, so-called, is allowed on the theory that one having a good reputation or being a law-abiding citizen is not so likely to commit a crime as one who does not enjoy such a reputation, but the weight of such evidence is entirely for the jury, and no reputation, however good, will excuse a crime, even a first offense.

You may find the defendant guilty or not guilty on both counts; or guilty of one and not guilty under the other. Although, I suppose, that if he is guilty of possession under the first count he must necessarily be guilty of transportation under the second. However, that, as well as all other questions of fact, I now submit to you for your decision.

After retirement, you shall select one of your number foreman. When you have unanimously agreed upon a verdict, verdicts in the Federal Court must be rendered by unanimous agreement of all of the jurors, you will have the foreman,—and only the foreman,—sign the verdict upon which you have agreed, and return it into open court.

Is there anything further, gentlemen?

Mr. Scott: Nothing.

Mr. Doyle: Nothing.

The Court: You may retire and consider the case.

Mr. Doyle: Note a general exception to the Court's charge.

Thereupon the jury retired and later returned into court with its verdict in favor of the plaintiff and against the defendant, as appears of record herein.

Thereupon the Court entered judgment upon said verdict, as appears of record herein, to which action of the Court the defendant duly excepted.

Thereafter and within three days after the rendition of the verdict and entry of judgment, the defendant filed his written motion for a new trial, which motion was overruled by the Court, to which ruling of the Court the defendant excepted.

Now comes the defendant and presents to the Court its bill of exceptions, in narrative form, taken on the trial of said cause, and the Court, upon consideration thereof, finds the same to be a true, correct and complete bill of exceptions, and the same is hereby allowed and signed and ordered to be filed as part of the record herein this 8th day of June, 1937.

S. H. West,
Judge.

ORDER APPROVING BILL OF EXCEPTIONS.

(Entered June 8, 1937 by S. H. West, Judge.)

Now comes the defendant and presents to the Court his bill of exceptions in narrative form, taken on the trial of said cause, and the Court upon consideration thereof finds the same to be a true, correct and complete bill of exceptions and the same is hereby allowed and signed and ordered to be filed as part of the record herein this 8th day of June, 1937.

ASSIGNMENT OF ERRORS.

(Filed June 5, 1937.)

The defendant in the above entitled cause files the following assignment of errors upon which he will rely in the prosecution of his appeal herein from the judgment and sentence of this Court, entered the 7th day of May, 1937:

1. In that the Court erred in denying the defendant's Motion to Suppress the evidence and return the property seized, for the following reasons:

(a) Because the search made of the premises and the seizure of the property was unlawful, in that the Federal officers making the search violated Section 14, Article 1, of the Constitution of the State of Ohio, and the 4th and 5th Amendments of the Constitution of the United States.

(b) Because the search of the premises was unlawful, in that the Federal officers had no special cause to justify a search of said premises.

(c) Because the search of the premises was part of a private dwelling and was made without a search warrant and was not incidental to any lawful arrest.

(d) Because the Federal officers used the information they obtained by their unlawful search and seizure as evidence in said cause, in violation of the defendant's constitutional rights.

(e) Because said premises were searched without a search warrant and without probable cause to believe that a crime was being committed at the time the search was made, in violation of the rights of the defendant under the State and Federal Constitution.

(f) Because said Federal officers, who made the search, were trespassing upon the land of the defendant, within the curtilage of his dwelling-house, when they alleged they discovered facts, by reason of which they claim probable cause for the search of the premises.

(g) Because the search was made without any warrant for the arrest of the defendant.

2. In that the Court erred in its ruling, sustaining the objections to the following evidence, to which ruling the defendant duly excepted:

"Q. Did you receive any information which you considered reliable concerning his actions in Charleston, West Virginia?

Mr. Scott: I object, your Honor.
The Court: Objection sustained.
Mr. Doyle: Exception.

Q. Have you at any time received any information concerning Scher which you considered reliable information and later turned out to be unreliable, false and perjurious?

Mr. Scott: I object.
The Court: Objection sustained.
Mr. Doyle: Exception."

(Page 29, Narrative Bill of Exceptions.)

The sustaining of the objection to the above evidence is assigned as error, first, for the reason that on cross examination the defendant was entitled to test the ability of the witness to determine whether or not his alleged information was reliable, and so that the Court and jury might determine whether or not the witness had reasonable cause to believe this informer, and whether the officers were justified in their belief; and secondly, the defendant was entitled to know the name of the informer so that he might impeach the testimony of the Government witnesses.

3. In that the Court erred in its ruling sustaining the objection to the following evidence, to which ruling the defendant duly excepted:

"Q. Mr. Bowes, will you tell us the name of your confidential informer?

Mr. Scott: I object.
The Court: Objection sustained.
Mr. Doyle: May I be heard on that?
The Court: No, sir. I will not hear you. That has been too often decided. I have decided it, as you know, and many other courts have decided that question should not be answered. I shall not re-examine the question. I have examined it again within the last 48 hours.
Mr. Doyle: May I dictate my offer?
The Court: Certainly.
Mr. Doyle: The defendant proposes to show by this line of cross examination that the witness received information which he considered reliable

at the former trial by producing two witnesses who testified concerning the movements of the defendant Scher, which testimony later developed by an investigation by the Attorney General of the United States to be false, perjurious and unreliable."

(Pages 34 and 35, Narrative Bill of Exceptions.)

The sustaining of the objection to the above evidence is assigned as error for the following reasons: First, that the defendant was entitled to know the name of the confidential informer, so that the Court and jury might determine whether or not the officers had reasonable cause to believe this informer, and whether the officers were justified in their belief; and secondly, the defendant was entitled to know the name of the informer, so that the defendant might impeach the testimony of the government witnesses.

4. In that the Court erred in its ruling, overruling the objection to the following evidence, to which ruling the defendant duly excepted:

"Q. What was the reason for your going out there in this vicinity?

A. I received reliable information from a confidential informer that a certain 1935 Dodge sedan, license LX-418—

Mr. Doyle: I object to the answer, and ask that it be stricken on the ground it is hearsay, and information obtained or statements made not in the presence of the defendant.

The Court: You may save the point.

Mr. Doyle: Exception."

(Page 28, Narrative Bill of Exceptions.)

The overruling of the objection to the above evidence is assigned as error for the reason that this evidence is mere hearsay and based on information obtained and conversations had not in the presence of the defendant. The admission of this testimony was prejudicial error.

5. In that the Court erred in giving the following charge to the jury, to which charge the defendant duly excepted:

"WEST, *J.*: (Orally)

Members of the jury, the statute under which this indictment is drawn provides that no person shall transport or possess, buy or sell, any distilled spirits unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal taxes imposed on such spirits. The provision of this section does not apply to distilled spirits not intended for sale or for use in the manufacture or production of any articles not intended for sale.

The indictment charges that on December 31st, 1935, in this jurisdiction, the defendant knowingly and unlawfully possessed, in a Dodge sedan, License LX-418, a quantity of distilled spirits, being about twenty-four quarts of gin and thirteen and one-fifth gallons of whiskey, the immediate containers of which did not have affixed thereto stamps denoting the quantity of spirits therein and evidencing payment of internal revenue taxes, in violation of the provisions of the section which I have just read to you.

Count 2 charges the defendant with the unlawful transportation in the same Dodge sedan of the same liquor in unstamped containers.

The defendant has pleaded not guilty and is presumed to be innocent of both of these offences. You will not be justified in finding him guilty unless the evidence satisfies you of his guilt beyond a reasonable doubt. Proof of guilt beyond any possible doubt is not required, but only proof beyond a reasonable doubt. That is, you must be satisfied, before you can find him guilty, that the evidence proves such guilt to a moral certainty. If the Government's proof does not convince your minds to this degree, or if the defendant's evidence raises a reasonable doubt of his guilt, then you shall acquit him.

No presumption arises against the man because this indictment has been returned and he has been tried upon it.

The defendant admits, and the evidence clearly shows, that on the night in question he did have in his possession, and did transport as charged, the liquor named in the indictment; and it appears that the bottles did not bear the stamps required by law.

The first question of fact for you to decide is whether the defendant knew before the officers searched this car that the ninety bottles in the car were unstamped. He says he did not. But, notwithstanding that, the other facts and circumstances disclosed may convince you that Scher is falsifying; that he did know and must have known that this was illegal liquor on which the tax had not been paid, and, consequently, that no tax stamps were on the bottles. You are to weigh his assertion that he did not know against other evidence and circumstances, if there are any, tending to prove that he must have known, and from all of the evidence are to determine where the truth lies.

Hyman Scher is of mature age, intelligence, and was in business with one of his brothers. In December, 1935, he testifies that an unknown man, whom he knew only as 'Joe,' I believe, came to the hat store and told him that good liquor was to be had at a certain address on Drexel Avenue, at a great bargain; and that when the defendant showed his interest in the matter, this unknown man went to the telephone, and as I remember, made a 'date' for the defendant to visit the party on Drexel Avenue. He says that he drove out that night and went to the place and interviewed a man named Carr, who told him he was selling out his business and could let him have seven cases of Canadian bonded liquor at a very low price, $22.50 a case, and he says that as he and his family were much given to generous entertainment, and were planning to hold a party for the next night, he thought well of this offer and so took a case as a sample, loaded it into his automobile, and drove to his home on Olivet Avenue to get his brother's opinion, and that there the whiskey was sampled and its purchase decided on.

At this point a matter appears which you should consider. The officers, or one of them, testified that when the Dodge car first appeared at the Drexel Avenue place, it was not driven in but was parked in the street. The driver entered the house and shortly emerged with a package like those later found in the car, but that there were a great many of these packages in the car,—some thirty, I believe they said. So that if this is true, and I believe Scher did not deny it, one package might not contain twelve bottles, for the whole number of bottles found in the

car was ninety, and a case is said to contain twelve bottles.

Again, the officers say, and it is not contradicted, that three women came from the house with Scher and drove away with him and returned with him when he returned. Now, the defendant says nothing about these three women, and it may seem strange to you that if he did, in fact, drive to see his brother, and take the liquor to him for inspection, neither he nor his brother have remembered, or at least have not given any account, of the three women; nor have any of the women been produced to contradict these witnesses,—to corroborate these witnesses. Of course, it is possible they may just have gone for the ride and remained in the machine while the defendant took the whiskey into the house on Olivet Avenue to exhibit it to his brother, who knew nothing of the women being outside in the cold. That would explain the brother's failure to mention that, but would not, as I see it, account for the failure of the defendant to either produce them and have them tell where he took them and so substantiate the story of the visit to the brother, or else explain why they are not produced.

The Government is not shown to know who these women were or to be able to produce them. The defendant and his counsel would hardly overlook a matter so vital to the defendant—I say 'vital,' because Scher and his brother both testified that it was when the defendant brought the sample case to their home on Olivet that the purchase of the seven cases for the New Year's party was decided, and it was there that the defendant secured funds to help pay the price of $145.00, and any evidence that such a visit was made would tend to corroborate that.

While the failure to produce corroborating testimony or account for its absence may well be thought by the jury to cast a grave doubt upon their story, the effect, of course, of these discrepancies, if you find they exist, is entirely for the jury to decide.

Now, getting back to the question whether Scher knew the bottles were not stamped: if you accept the testimony that he did take a case to his brother, then it appears that a bottle was opened by them and one or more drinks taken, and, although the tes-

timony shows that these stamps are applied to the cork, Scher insists he did not notice the absence of the stamps. Again, you should consider that the two trips to the Drexel Avenue house were made at night to get a bargain at a private home, and not a lawful liquor store. Now, under those circumstances, was it at all probable that the defendant expected this bargain price liquor to be lawful liquor on which the tax had been paid?

He said that Carr assured him it was Canadian bonded goods; but it seems to me evident that Scher did not understand from that that it would be tax paid, for he testified that to him 'Canadian bonded whiskey' meant simply whiskey of a good quality.

From all of the testimony bearing on the point, and giving effect to the reasonable inferences to be drawn from such facts as are either admitted or proven, what do you say? Did the defendant know and appreciate that the bottles were not stamped? If he did not, your verdict must be not guilty; but if he did, then you should consider the affirmative defense which the defendant also advances.

The statute involved here which prohibits possession or transportation does not apply to distilled spirits not intended for sale or for use in manufacturing or producing articles intended for sale, and it is the contention of the defendant and his counsel that the defendant bought this liquor not for sale but for the use of himself and his family and friends, and, consequently, that the statute has no application to him. This may be called an affirmative defense, and upon this issue the burden does not rest upon the Government, but the defendant has the burden of showing by the greater weight of the evidence that although the taxes had not been paid and the containers bore no stamps, yet the statute did not apply against him because he did not intend to sell the liquor or use it for making some article for sale.

The law is that when one is found transporting distilled liquors in unstamped containers, and, therefore, prima facie committing an offense, he would be required to explain why he shall not be regarded as a violator, and the burden of proof rests on him to make a satisfactory explanation by proof to a jury that the spirits were not intended to be sold or used to produce articles for sale. He is not required to prove this beyond a reasonable doubt, but he is re-

quired to prove it by the fair preponderance of the testimony.

Now, Scher testifies, and in this he is supported by several members of his family, that he had this liquor solely for their personal consumption and entertainment of their guests. The Government, in the nature of things, cannot produce direct evidence of the man's purpose and intention when he bought the liquor. As in most such cases, the Government relies on circumstantial evidence, which may properly be received and considered by the jury in this case. Among the circumstances to be considered are the time, place, and the nature of the place, and the method employed in securing the liquor.

Scher was using an automobile bought by him in his brother's name and licensed in the name of his brother. He has an explanation for that, which you will consider, giving it such weight as you think it is entitled to. He acted on information from a man said to be unknown to him. He drove to this private home in the night. He left with three women, and Scher returned, drove into the yard to get the load, but extinguished the lights on his car while it was being loaded, and bought seven and a half cases, or ninety bottles of liquor put out in unstamped bottles, marked and labeled s being very well known brands. Would a man, or th e men, in the situation of the Schers, be likely to spend $145.00 at one time for liquor for their friends and family, when they then had, according to the testimony, at least a case available for use in their house?

The Government does not claim that any one of these circumstances disproves Scher's assertion, but it does contend that when they are all taken together, they do refute it.

It is not contended that the defendant expected to sell this liquor at his home on Olivet; that a bootleg joint was conducted at this place. If the defendant, in other words, was to sell, it would make no difference when or where or to whom the proposed sales were to take place; and of course you all appreciate that bootleggers often times ply their trade in various ways without having any fixed location for the operation of their business.

You will also consider the testimony as to the habit of entertaining at the Olivet Street home. I need not repeat that evidence. Just how much truth

or probability there may be in it, in the testimony of the father and the others of the members of the family upon this point, is for you to say.

And as to all of the testimony the jury is the sole judge of its weight. So, too, you are to judge the credibility of the witnesses. In general, you may consider the appearance and demeanor of the witnesses; his frankness or lack of it; the reasonableness or unreasonableness of his story; and the interest he has in the outcome of the case; whether, because of relationship to the defendant, or otherwise; and from all of the testimony touching these matters, it is for the jury to say just what weight, if any, you will give to the evidence of any witness. But, more specifically, if you find that the defendant or any other witness has wilfully and knowingly testified falsely to a material matter, you may disregard all of his evidence. For example, if when the defendant testified that he did not know that the containers of the liquor were not stamped, he wilfully testified to what he knew to be false, you have the right to reject not only that evidence, but all of the rest of his testimony, as well.

I have followed the custom in Federal courts to briefly relate to the jury some of the more important testimony,—not to interfere with your function as triers of the fact, but only to help you to remember and apply that evidence, for you are the sole judges of facts and are not bound to follow any view of the Court as to them; and you should consider all of the evidence, not merely that of which I have spoken. And if your memory differs from mine, you are to take the testimony as you recall it.

You must not be influenced by any bias, prejudice or sympathy, either for or against the defendant. For example, he testified that he expects to be married soon. Whether that was intended to arouse your sympathy, I do not know, but at all events, the defendant's matrimonial plans and the probability of it being interfered with are not to be given any consideration or any weight whatever by this jury. It is not concerned with the result of the verdict or how it will affect the defendant, or anyone else.

The evidence has been received to show the defendant's good reputation. Such character evidence, so-called, is allowed on the theory that one

having a good reputation or being a law-abiding citizen is not so likely to commit a crime as one who does not enjoy such a reputation, but the weight of such evidence is entirely for the jury, and no reputation, however good, will excuse a crime, even a first offense.

You may find the defendant guilty or not guilty on both counts; or guilty of one and not guilty under the other. Although, I suppose, that if he is guilty of possession under the first count he must necessarily be guilty of transportation under the second. However that, as well as all other questions of fact, I now submit to you for your decision.

After retirement, you shall select one of your number foreman. When you have unanimously agreed upon a verdict, verdicts in the Federal Court must be rendered by unanimous agreement of all of the jurors, you will have the foreman,—and only the foreman,—sign the verdict upon which you have agreed, and return it into open court.

Is there anything further, gentlemen?

Mr. Scott: Nothing.

Mr. Doyle: Nothing.

The Court: You may retire and consider the case.

Mr. Doyle: Note a general exception to the Court's charge.

(Pages 51 to 57, both inclusive, Narrative Bill of Exceptions.)

The above charge given to the jury by the Court is assigned as error here for the reason that the Court by said charge invaded the province of the jury as triers of the facts, and that said charge as a whole was prejudicial and adverse to the interests of the defendant.

6. In that the Court erred in giving the following charge to the jury, to which the defendant duly excepted:

"'The statute involved here which prohibits possession or transportation does not apply to distilled spirits not intended for sale or for use in manufacturing or producing articles intended for sale, and it is the contention of the defendant and his counsel that the defendant bought this liquor not for sale but for the use of himself and his family and friends, and, consequently, that the statute has no

application to him. This may be called an affirmative defense, and upon this issue the burden does not rest upon the Government, but the defendant has the burden of showing by the greater weight of the evidence that although the taxes had not been paid and the containers bore no stamps, yet the statute did not apply against him because he did not intend to sell the liquor or use it for making some article for sale.

The law is that when one is found transporting distilled liquors in unstamped containers, and, therefore, prima facie committing an offense, he would be required to explain why he shall not be regarded as a violator, and the burden of proof rests on him to make a satisfactory explanation by proof to a jury that the spirits were not intended to be sold or used to produce articles for sale. He is not required to prove this beyond a reasonable doubt, but he is required to prove it by the fair preponderance of the testimony."

(Page 55, Narrative Bill of Exceptions.)

The giving of the above charge is assigned as error here for the reason that the Court placed an unfair burden of proof upon the defendant in that he charged the jury that the burden rested upon the defendant to show, by the greater weight of the evidence and by the fair preponderance of the testimony that the statute under which the defendant was charged did not apply to the defendant by reason of one of the exceptions set forth therein. The giving of said charge was prejudicial and adverse to the interests of the defendant.

7. In that the Court erred in giving the following charge to the jury, to which the defendant duly excepted:

"It is not contended that the defendant expected to sell this liquor at his home on Olivet; that a bootleg joint was conducted at this place. If the defendant, in other words, was to sell, it would make no difference when or where or to whom the proposed sales were to take place; and of course you all appreciate that bootleggers often times ply their trade in various ways without having any fixed location for the operation of their business."

(Page 56, Narrative Bill of Exceptions.)

The giving of the above quoted charge is assigned as error here for the reason that there was no testimony nor

any proof whatsoever that the defendant was a bootlegger, or engaged in the business of bootlegging, and therefore, the reference by the Court to "bootleggers" is prejudicial error.

8. In that the Court erred in giving the following charge to the jury, to which the defendant duly excepted:

> "And as to all of the testimony the jury is the sole judge of its weight. So, too, you are to judge the credibility of the witnesses. In general, you may consider the appearance and demeanor of the witnesses; his frankness or lack of it; the reasonableness or unreasonableness of his story; and the interest he has in the outcome of the case; whether, because of relationship to the defendant, or otherwise, and from all of the testimony touching these matters, it is for the jury to say just what weight, if any, you will give to the evidence of any witness. But, more specifically, if you find that the defendant or any other witness has wilfully and knowingly testified falsely to a material matter, you may disregard all of his evidence. For example, if when the defendant testified that he did not know that the containers of the liquor were not stamped, he wilfully testified to what he knew to be false, you have the right to reject not only that evidence, but all of the rest of his testimony, as well."

(Page 56, Narrative Bill of Exceptions.)

The giving of the above charge is assigned as error here for the reason that the Court failed to charge the jury that, though a witness may have testified falsely in one part, the jury, in addition to having the right to reject all of his testimony had also the right to reject any part of his testimony and retain the other as true. Failure so to charge the jury was prejudicial error.

9. In that the Court erred in overruling defendant's motion for a new trial and in refusing to grant a new trial on the ground that the verdict of the jury was against the weight of the evidence since the defendant had shown by the weight of the evidence that the liquor found in his possession was not intended for sale or for use in the manufacture of articles intended for sale.

10. In that the Court erred in overruling defendant's motion for a new trial and in refusing to grant a new trial upon the grounds therein stated, all of which are fully enumerated and assigned in the foregoing assignment of errors, to which reference is hereby made.

WHEREFORE, said defendant prays for a reversal of said judgment and sentence made and entered in said District Court in the within case.

GERALD A. DOYLE,
Attorney for Defendant,
521 Guarantee Title Building,
Cherry 4953.

Service of a copy of the foregoing Assignment of Errors is acknowledged this 5th day of June, A. D. 1936.

ROY C. SCOTT,
Asst. United States District Attorney.

PRECIPE FOR TRANSCRIPT.

(Filed May 27, 1937.)

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause and include therein the following papers and orders:

1. Indictment.
2. Motion to Suppress Evidence.
3. Order over-ruling Motion to Suppress Evidence.
4. Plea of Not Guilty.
5. Jury Sworn and Orders on Trial.
6. Motion for New Trial.
7. Memorandum of Court Over-ruling Motion to Suppress the Evidence.
8. Order over-ruling Motion for New Trial and Judgment.
9. Notice of Appeal.
10. Order Fixing Bail Bond.
11. Bail Bond.
12. Order Fixing Time for Preparation of Record.
13. Order Directing Appellant to Lodge Bill of Exceptions.
14. Bill of Exceptions and Exhibits.
15. Order on Bill of Exceptions.
16. Assignment of Errors.
17. Precipe.
18. Clerk's Certificate.

GERALD A. DOYLE,
Attorney for Defendant,
521 Guarantee Title Bldg.,
Ch. 4953.

Copy of within received this 27 day of May 1937.

E. B. FREED,
U. S. Attorney,

By ROY C. SCOTT,
Asst. U. S. Atty.

CERTIFICATE OF CLERK.

NORTHERN DISTRICT OF OHIO, ss:

I, C. B. WATKINS, Clerk of the United States District Court, within and for said district, do hereby certify that the foregoing typewritten pages contain a full, true and complete copy of the record and all proceedings and pleadings in this cause in accordance with the praecipe for transcript filed herein, the originals of which papers remain in my custody as Clerk of said Court.

There are also transmitted and certified herewith the original bill of exceptions and the assignment of errors, all in accordance with Rule IX of the Supreme Court of the United States with reference to the practice and procedure with respect to proceedings in criminal cases after verdict.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said court at Cleveland, in said district this 9th day of June, A. D. 1937 and in the one hundred and sixty-first year of the Independence of the United States of America.

C. B. WATKINS, *Clerk*,
By K. V. WILSON,
Chief Deputy.

(Seal)

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED—November 11, 1937

(Before Moorman, Allen and Nevin, JJ.)

This cause is argued by Gerald A. Doyle for Appellant and by Roy C. Scott for Appellee and is submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Entered February 18, 1938

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

HYMAN SCHER, Alias WILLIAM SCHER, Appellant,

v.

THE UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division

OPINION—Filed February 18, 1938

Before Moorman and Allen, Circuit Judges, and Nevin, District Judge

Per CURIAM:

The appellant was found guilty under two counts of an indictment charging him with unlawful possession and

transportation of distilled spirits, the containers of which did not have revenue stamps affixed thereto. The offenses charged were violations of Section 1152a, Title 26, U. S. C.

Investigators of the Alcohol Tax Unit at Cleveland, Ohio, received confidential information from a source previously proved to be reliable that a load of tax-unpaid distilled spirits in bottles would be taken from a given address in a certain car, the make, model, and license number of which were given, at about midnight of December 30, 1935. The investigators saw appellant call at the designated address in a car of the specified make, model, and license number, at about nine P. M., and leave about ten-thirty, carrying a package and accompanied by three women. The car returned about midnight. It was parked without lights in the driveway at the rear corner of the house for about half an hour. From the opposite side of the street the investigators heard the rear door of the house open, and several times heard the sound of heavy paper being scraped across a hard surface, after which they heard two doors slam. Appellant then drove the car, which appeared to be heavily loaded, to his residence. He drove into the garage, and was in the act of getting out of the car when one of the investigators approached with a flashlight, and asked if the car was hauling bootleg whiskey. Appellant said it was for a party, and in reply to the question as to whether it was tax paid, said that it was "Canadian whiskey," and that it was in the trunk of the car. In the car eighty-eight bottles without tax stamps were found in fourteen packages similar to that which appellant had previously carried from the premises under observation.

Appellant's principal contentions are (1) that the court erred in denying appellant the right to cross-examine as to the identity of the informant, and (2) in overruling appellant's motion to suppress the evidence.

As to the first contention, for reasons of public policy the identity of a confidential informant must be kept secret, and such sources need not be disclosed. Segurola v. United States, 16 Fed (2d) 563 (C. C. A. 1); Vogel, Extr., v. Gruaz, 110 U. S. 311; Shore v. United States, 49 Fed. (2d) 519 (C. A. D. C.); McInes v. United States, 62 Fed. (2d) 180 (C. C. A. 9); Wilson v. United States, 65 Fed. (2d) 621 (C. C. A. 3); Goetz v. United States, 39 Fed. (2d) 903 (C. C. A. 5).

As to the second contention, appellant moved to suppress evidence obtained as a result of the search, on the ground that the search was without a warrant or without probable cause, and in violation of Section 14, Article I, of the Constitution of Ohio, and the Fourth and Fifth Amendments to the Constitution of the United States. The District Court overruled this motion, and its action was correct. The garage was not searched. Appellant did not oppose the search of the car. The circumstances presented facts within the personal knowledge of the agents, sufficient to lead a reasonably discreet and prudent man to believe that liquor was illegally possessed in the automobile. There was no unlawful search and seizure. Husty v. United States, 282 U. S. 694; Carroll v. United States, 267 U. S. 132, 149; Wisniewski v. United States, 47 Fed. (2d) 825 (C. C. A. 6); Ferracane v. United States, 47 Fed. (2d) 677 (C. C. A. 7); United States v. Kind, 87 Fed. (2d) 315 (C. C. A. 2) is distinguishable upon the facts.

The judgment is affirmed.[1]

Petition for rehearing, covering 10 pages, filed March 18, 1938, omitted from this print. It was denied, and nothing more by order dated April 13, 1938.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—Filed April 13, 1938

The petition for rehearing of this cause is hereby denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER AMENDING OPINION—Filed April 13, 1938

It is ordered that the opinion in the above case be amended by striking out of the next to last paragraph

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[1] Judge Moorman took no part in the decision of this case.

thereof the following sentence: "Appellant did not oppose the search of the car."

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 31, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.